

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020110479

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PARENT ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT.

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DECISION

JUNE 10, 2021

On November 13, 2020, Parent on behalf of Student filed a Due Process Hearing Request with the Office of Administrative Hearings, called OAH, naming San Marcos Unified School District. Student and Parent are collectively referred to as Student. On January 22, 2021, OAH granted Student's motion to amend the complaint, and OAH deemed Student's first amended complaint filed on that date. On March 8, 2021, OAH granted Student's request to continue the due process hearing.

Administrative Law Judge Elsa H. Jones heard this matter by videoconference on April 13, 14, 15, 19, 20, and 21, 2021.

Attorneys Linaja M. Duncan and Richard L. Isaacs represented Student. Father attended part of the hearing. Attorneys Summer D. Dalessandro and Julie C. Coate represented San Marcos Unified School District. Lori Cummins, Director of Special Education for San Marcos Unified, attended all hearing days.

At the parties' request, OAH continued the matter to May 17, 2021, for written closing briefs. The record was closed, and the matter was submitted on May 17, 2021.

## ISSUES

1. Did the individualized education program, referred to as an IEP, dated November 14, 2018, as amended, deny Student a free appropriate public education referred to as a FAPE, by:
  - a. Failing to offer sufficient specialized academic instruction;
  - b. Failing to offer services to address Student's needs in the areas of occupational therapy, executive functioning, and speech and language, and
  - c. Failing to include goals in the areas of attention, on-task behavior, executive functioning, and reading?
2. Did the IEP dated November 12, 2019, as amended, deny Student a FAPE by:
  - a. Failing to offer sufficient specialized academic instruction;
  - b. Failing to offer services to address Student's needs in the areas of occupational therapy, executive functioning, and speech and language;
  - c. Failing to include goals in the areas of occupational therapy, behavior, executive functioning, attention, and task completion, and appropriate reading goals?

3. Did the IEP of November 10, 2020, as amended, deny Student a FAPE by:
  - a. Failing to offer appropriate and sufficient specialized academic instruction;
  - b. Failing to offer services to address Student's needs in the areas of occupational therapy and executive functioning;
  - c. Failing to include goals in the areas of independent task-completion and reading, including reading comprehension, vocabulary and an appropriate writing goal?

The issues were reorganized for clarity and typographical errors were corrected. The ALJ has authority to renumber and redefine a party's issues so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 432-433.)

Student's closing brief referenced issues concerning implementation of the IEPs. These issues were not raised in the amended complaint or included in this matter. Therefore, issues regarding the implementation of the IEPs are not considered in this Decision. (Ed. Code, § 56502, subd. (i).)

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) Unless otherwise stated, all references to the Code of Federal Regulations are to the 2006 version.

The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

1. all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
2. the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student requested this hearing, and therefore has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 13 years old and in seventh grade at the time of hearing. Student resided within San Marcos Unified's geographic boundaries and attended Double Peak Elementary School during the time period at issue. On December 18, 2020, Student withdrew from San Marcos Unified and moved outside of California with his family.

Student was initially found eligible for special education as a student with a specific learning disability when he was six years old. Student repeated first grade. He received occupational therapy and speech and language services until 2016, when he was in third grade. At that time, after assessment, the IEP team determined that Student no longer required those two services. At all relevant times, Student was eligible for special education under the categories of specific learning disability and other health impairment. At all relevant times, San Marcos placed Student in a general education class, and offered his specialized academic instruction and related services on a push-in and/or pull-out basis.

#### ISSUE 1: DID THE IEP DATED NOVEMBER 14, 2018, AS AMENDED, DENY STUDENT A FAPE?

Student contended that the November 14, 2018 IEP, as amended, deprived Student of a FAPE. Specifically, Student asserts it did not offer sufficient specialized academic instruction, did not offer speech and language and occupational therapy services, and did not include goals in the areas of reading or executive functioning. Student alleges he did not make appropriately ambitious progress. San Marcos Unified contended that the IEP offered an appropriate amount of specialized academic instruction, and offered services and goals to address all of Student's needs. San Marcos Unified contends Student made progress under this IEP.

A FAPE means special education and related services that are available to an eligible child that meet state educational standards, and are provided at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA.

(20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].) (*Endrew F.*) Citing *Rowley*, the *Endrew F.* court affirmed that, for a child fully integrated in the regular classroom, an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (137 S.Ct. at 999.)

In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).)

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) As the court noted in *Endrew F.*, *supra*, 137 S.Ct. at p. 999, crafting an IEP requires a prospective judgment, and judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether it is regarded as ideal.

The contents of the IEP are mandated by the IDEA. The IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals, and to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031, subd.(a).) Related services include transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education, and includes speech-language pathology and occupational therapy services. (34 C.F.R. § 300.34(a), Ed. Code, § 56031, subd. (b).)

The IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance. The IEP shall include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved, and make progress, in the general education curriculum based upon the child's present levels of academic achievement and functional performance; a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports of the child's progress will be issued to the parent. (20 USC § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.)

An IEP team must consider a parent's input, but it need not necessarily follow a parent's wishes. For example, in *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314, (*Gregory K.*), the court stated that if a school district's program was

designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) Citing *Rowley, supra*, 458 U.S. 176, 197, footnote 21, the court stated, "An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*Gregory K., supra*, at p. 1313.) This concept was also endorsed by the Supreme Court in *Endrew F.*, when it stated that the FAPE standard did not go so far as to require providing an education that aimed to provide a child with disabilities opportunities to achieve academic success, attain self-sufficiency, and contribute to society that were substantially equal to the opportunities afforded neurotypical children. (*Endrew F., supra*, 137 S.Ct. at 1001.)

## STUDENT'S NOVEMBER 14, 2018 IEP

On November 14, 2018, when Student was 11 years old and in fifth grade, San Marcos Unified convened Student's annual IEP team meeting. The IEP team included Parents, an administrative designee, Student's general education teacher Debbie Sanchez, and Student's special education teacher Heide Brown. Brown received her master's degree in special education from California State University, San Marcos. She held a California education specialist teaching credential, Level II, and a multiple subject clear teaching credential. She had been employed by San Marcos Unified since 2002.

Student's primary disability category was other health impairment, and his secondary disability category was specific learning disability. Based on the results of Student's 2016 psychoeducational evaluation, Student's disabilities affected his involvement and progress in the general curriculum. Student demonstrated significant



levels of inattention and hyperactivity at school across subject areas. His learning was impacted within the general education setting, and specialized academic support was beneficial for Student to succeed in general education. He also continued to demonstrate a processing deficit in attention and memory which impacted his academic abilities.

Parents expressed concerns regarding Student's educational progress, and wanted to improve Student's below-grade level capabilities in language arts, especially in his reading comprehension and writing. Student made marginal improvement, but was not performing at the level of his peers.

The IEP team found that Student benefited from repetition of directions and new material. He was proud of his involvement in a basketball league outside of school. He enjoyed using technology and hands-on science activities. Student demonstrated significant levels of inattention and hyperactivity.

The team considered Student's present levels of performance. Student read at a fourth grade level on the Fountas and Pinnell Reading Assessment. During the prior school year, Student improved three Fountas and Pinnell reading levels. Student scored 530L on a recent state standardized Lexile assessment, which fell in the third grade level range. Fountas and Pinnell and Lexile scores are two different systems of reading levels that San Marcos Unified used. Lexile scores reflected a student's independent reading level range. Independent reading level ranges were not the same as an instructional level reading range, which was the reading level range of a student with educational support. A student's independent or instructional reading level could cover a range of grades, depending on the type of reading material.

Student continued to require prompting to provide more details when giving a summary of what he read. He had difficulties analyzing a passage and answering questions about it. He also had difficulties understanding different points of view, which posed a challenge when he participated in discussions with peers about characters in the class readings. He required moderate teacher guidance to reread and to use strategies to identify information and text evidence to help him comprehend and answer questions about the content of his reading.

As to writing, Student could independently use an outline or graphic organizer to draft and plan his thoughts. He continued to need guidance to elaborate on his thoughts and include text evidence. He also continued to need teacher support to proofread and edit his work for capitalization, punctuation, and flow of ideas. In the last three writing samples, Student wrote from 7 to 11 sentences in each paragraph and had 67 percent, 91 percent, and 92 percent accuracy on capitalization and ending punctuation.

The team determined math was a relative strength for Student. He scored 85 percent for multi-step problem-solving on his Unit 1 math assessment. Work samples reflected Student solved word problems with 80 percent accuracy, and benefitted from repetitions and reading the problem aloud. When he correctly solved the problem, he sometimes needed prompting to explain his reasoning.

The team noted Student's speech and language services and occupational therapy services were discontinued in November 2016. No team member raised any concerns about Student's speech or gross motor or fine motor skills. Student participated in general physical education, and he wrote legibly.

In the social emotional/behavioral area, the team noted Student participated in the class-wide behavior system and responded well to incentives and positive reinforcement. He benefitted from teacher check-ins and sometimes required repeated directions and clarification. He was able to complete independent work. He struggled with perspective taking, and at times needed help resolving peer conflicts.

In the vocational area, Student was learning how to use computer word processing programs and presentation applications. He was working on developing organizational habits such as using a binder and planner to improve his independence.

Student did not need assistance with daily living skills at school, and he regularly attended school.

The team determined Student's areas of need were language arts and math.

On the Special Factors page of the IEP, the IEP provided Student required assistive technology in the form of text-to-speech/speech-to text to support access to the general education curriculum. He had no behaviors that impeded his learning or that of others.

The team determined Student would take the California Assessment of Student Performance and Progress in Language Arts and Math, and the California Science test, all with a variety of accommodations.

The team reviewed Student's progress on his previous IEP's four goals. Student met his reading comprehension goal, based on his Fountas and Pinnell reading assessment, on which he scored at a fourth grade instructional level with 98 percent accuracy and 5 out of 9 on comprehension. A score of 5 out of 9 on comprehension was a satisfactory comprehension score for a fourth grade instructional level, according

to the Fountas and Pinnell assessment scoring system. Student did not meet his previous goal of writing fluency, although he made progress, as reported in his present level of performance. He met his math goal of multi-step problem solving. Brown reported Student met his fourth goal, a task/work completion goal, based on teacher data, as Student completed all independent classroom work. The goal required Student to independently complete independent work applying strategies taught with 80 percent accuracy, as measured through review of teacher data charts.

The team developed two new goals in the areas of math word problems and responding to literature. Goal 1 was labeled "word problems." The goal required Student to solve multi-step math problems involving all operations by identifying key information, creating an equation, and supporting his solutions through verbal or written response, with 85 percent accuracy, as measured by data collected from work samples, tests/quizzes, and other school district performance-based assessments. The goal stated it would enable Student to be involved/progress in general curriculum, but did not list a particular state standard. The IEP notes reflected that the team discussed the math goal in terms of Student's continuing to work on word problems. The baseline for the goal repeated the information contained in Student's math present level of performance.

Goal 2 was labeled "responding to literature." The baseline was a combination of Student's reading and writing present levels of performance, but did not include his Fountas and Pinnell score, which reflected he was reading at a 4th grade level. The goal required Student to read 4th grade level text (Lexile level 740-940). Then, following a teacher-led discussion, and given a graphic organizer with sentence starters, to write a paragraph with a specified rubric, as measured by work samples on three trials, scoring a 7/10 or higher. The goal referenced a sixth grade general education English Language

Literacy content standard, and the paragraph Student was required to write was at a more sophisticated standard than the baseline. Parents questioned whether there should be a reading goal separate from a writing goal, and the team discussed the appropriate Lexile range for Student.

The IEP placed Student in a general education class, with 300 minutes of push-in services per week. "Push-in" services are services that a service provider, such as a special education teacher or a speech therapist, provides a student in the student's regular classroom, during class time. The service grid of the IEP also included a reference to 300 minutes of specialized pull-out academic instruction, but the evidence reflected that was not part of this IEP offer. First, the dates referenced for this service were from November 17, 2017 to November 13, 2018, which predated the November 18, 2018 IEP offer. Second, the IEP reflected that Student would spend 100 percent of the time in general education. Third, Brown, Student's fifth grade special education teacher, only provided push-in services to Student under this IEP, and she testified that the IEP only offered push-in services. Consequently, evidence showed that the November 2018 IEP offered only push-in specialized academic instruction.

The IEP team determined numerous program accommodations were necessary, many of which served more than one purpose. The accommodations encompassed strategies and techniques to assist Student in coping with, among other things, attention issues, and to address inferencing. They included repeated, re-worded, or simplified instructions, breaking down information in manageable chunks, asking Student to paraphrase back in his own words to check for understanding; flexible schedule to allow Student breaks, different seating arrangements to support Student's ability to regain focus and sustain attention, reading aloud passages and questions, as appropriate, math questions/word problems read aloud, as appropriate; and access to a

separate setting for tests, assessments, reteaching, or when using extra time to complete assignments.

Other accommodations addressed Student's organizational skills, assisted him in completing his work in a timely manner, and enhanced his academic skills and ability to work independently. These included use of graphic organizers for reading comprehension and writing assignments; dictation to scribing support for brainstorming and writing; use of math manipulatives, calculator, and charts when completing assignments and assessments; allowing Student to respond in a variety of formats on assignments or assessment to demonstrate content knowledge, modified/alternate homework as needed or appropriate; and giving Student up to 50 percent extra time to complete tasks and assessments.

The accommodations also included guidance with resolving peer conflict, and navigating social situations, and speech-to-text and text-to-speech technology. The IEP also permitted Student to rework missed problems for a better grade.

Parents wished to confirm the data on which the team determined Student had met Student's task-completion goal, and to include such a goal on the new IEP. On December 11, 2018, the IEP team met and amended the IEP to update the progress report on Student's on-task/work completion goal from the previous year, and to add an on-task/work completion goal into Student's IEP. Brown reviewed additional data and determined the goal had not been met, and revised the progress report to state the goal was not met. The revised comment to the progress report explained teacher data reflected Student completed all independent work with an average of one to two prompts, and was averaging 70-75 percent accuracy on completed work. Student lost focus when he was not clear about the task directions or expectations, and needed

reminders to ask for help. The team revised the goal and it became Goal 3. The revised goal required, when Student was given an independent task or assignment and after a check-in with teacher to make sure Student understood the directions/expectations, Student would complete independent work applying strategies taught, with 80 percent accuracy as measured through review of teacher data charts.

### STUDENT'S PROGRESS OVER THE DURATION OF THE NOVEMBER 14, 2018 IEP, AS AMENDED.

Parents provided three to four hours per week of private tutoring during the 2018-2019 school year with Penny Bonnell, whom Father described as a retired elementary school teacher from another California school district. Bonnell did not testify at hearing. Bonnell worked with Student on all areas of his schoolwork, helping him to stay on task, complete his assignments and to understand his lessons. Parents paid her \$2,755 for her services during the 2018-2019 school year.

Student's report card at the end of the first semester of the 2018-2019 school year showed grades in language arts common core standards and math common core standards. The report card reflected Student needed improvement in reading effort. He received a 2, signifying developing, in the area of comprehending literature, a 1, signifying emerging, in the area of comprehending informational text, and a 2+ in word analysis/vocabulary.

In the speaking and listening area of language arts, Student received a 2+ in participating in collaborative conversations, and a 2 in communicating ideas on topics and texts. In the writing area of language arts, Student needed improvement in writing effort. He received a 1 in writing opinion pieces, a 2+ in writing information/explanatory texts, and a 1 in writing narratives.

In math common core standards, Student needed improvement in effort. He received a 2 in applying math concepts in problem solving. He received 3s, signifying proficient, in place value and whole number operations, and in decimal and decimal operations.

Additionally, Student received a 3- in social studies, and a 3- in science. His effort in physical education was satisfactory, but he needed improvement in effort in fine arts.

In February 2019, when Student was partway through fifth grade, Student took the state standardized reading test and obtained a 760 Lexile score, which represented a grade equivalent of fourth grade, nine months. It also represented an increase from the Student's 530 Lexile score reported in the November 2018 IEP.

At hearing, Brown, Student's fifth grade special education teacher, described the services she provided to Student. She provided small group and individual instruction on a push-in basis in the general education classroom to work on Student's goals. She worked with him in small groups and individually on writing assignments and on math, including his response to literature and word problem goals. The math problems were grade-level. The classroom was divided into reading groups, and the groups included a mix of special education and typical students. She worked with small groups of students within those groups. Student was not the lowest reader in class and his reading ability was within the range of the students in the classroom. The class, and Student, used leveled readers in the Benchmark curriculum, a general education curriculum. Brown worked on Student's reading comprehension using the Benchmark readers. Student read the texts, answered questions, and engaged in discussions about the material.



Brown also worked with Student individually at the end of each day on organizational skills, helping him to organize his materials, use his planner, and determine what he needed to get ready for the next day.

Student's second semester report card for fifth grade showed progress. His grades improved in nearly every subject area. His reading effort was satisfactory. He received a 2 in comprehending literature and a 2- in comprehending informational text. He received a 3 in word analysis/vocabulary. He received a 3- in participation in collaborative conversations, as well as in communicating ideas on topics and texts. He displayed satisfactory effort in writing, and received a 2+ in writing opinion pieces and writing informative/explanatory texts. He received a 2 in writing narratives.

Student achieved a math effort rating of excellent. He received a 3- in applied math concepts in problem solving. He received 3s again in place value and whole number operations and decimal and decimal operations. He received a 3- in four operations with fractions, a 2- in converting measurements and finding volumes, and a 2- in geometry and graphing. He received a 2+ in social studies, a 3 in science, a needs improvement in physical education, and a satisfactory in fine arts.

Student also made progress on his goals during the 2018-2019 school year. On Goal 1, his word problems goal, the goal progress report of March 22, 2019 reflected Student's scores ranged from 2+ to 3 on word problems on each of the last three weekly check-ins, and he received 100 percent on his dividing fractions quiz. His attitude toward school and his effort improved significantly in the previous few weeks. On June 10, 2019, at the end of the semester, Student received 88 percent on multi-step word problems involving multiplication, division, addition, and subtraction. He continued to work hard and took his time on his work. He ultimately met this goal, as

reported at the next annual IEP team meeting on November 12, 2019. Student averaged an 83 percent on his last three unit assessments, comprising a mixture of multi-step problems including multiplication, division, statistics, and geometry.

Student contended that Student did not meet this goal, as the goal called for 85 percent accuracy, not 83 percent. However, the goal provided the accuracy would be measured not only by tests, but also by work samples, quizzes, and other school district performance-based assessments. The progress note specifically referenced Student's recent math scores on the Kaufman educational achievement test, as well as his scores on state-wide assessments, and the data showed Student met grade level benchmarks and expectations. In any event, a 2 percent difference in accuracy, if true, was de minimus.

With respect to Goal 2, responding to literature, the progress report of March 22, 2019 noted Student received a 760 Lexile score on the state reading assessment. His two most recent writing assessment scores were 3 and 3-, which, the progress report note commented, signified "proficient, with some assistance from his tutor." He received a 2, developing, on a written assignment done independently. Again, the progress report noted Student's recent significant improvement in his attitude toward school and his effort. On the goal progress report of June 10, 2019, at the end of the semester, Student's most recent writing assessment scores were 77 percent and 75 percent, reflecting a 3 and 3-, which the progress report again noted signified "proficient, with some assistance from his tutor." Student ultimately met this goal. The final progress report, documented in the next annual IEP of November 12, 2019, commented that, given instructional supports, Student averaged a 93 percent in his English Arts class, and 90 percent on the last two writing tasks. The progress report comments also noted Student struggled with independently using graphic organizers

and outlines to develop a multi-paragraph composition. He was able to write body paragraphs, but he struggled with writing introduction and conclusion paragraphs.

Student contended he did not meet this goal, because it required a 740 Lexile level, and Student's level was only 690. This contention is unmeritorious, as it overlooks Student's 760 Lexile level as of the continued IEP team meeting of November 18, 2019, as discussed below.

Student also made progress on Goal 3, his on-task/work completion goal. Student ultimately met this goal, as reported in his next annual IEP dated November 12, 2019, as amended. Based upon recent class observations and given independent tasks to complete, Student completed four out of five tasks with fewer than three reminders. The comments on the goal progress note recorded Student improved his ability to ignore distractions, sustain focus, initiate work, and advocate for himself. Student would ask a peer, look at directions on the board, or ask a teacher or staff as needed to clarify what he needed to complete a task. He arrived at class prepared and ready to learn.

Student contended that the goal should not have been marked as met, because that was not consistent with the teacher's rating on the Conners assessment, administered as part of the triennial assessment, discussed below. Teacher's rating on the Conners placed Student in the elevated to very elevated ranges in the areas of inattention, hyperactivity/impulsivity, and learning problems/executive functioning. Student's contention places far more weight on the Conners than it merits. The Conners was one testing instrument, responded to by one teacher. Student's argument assumes that one teacher's ratings on the Conners is congruent with the functional skills Student demonstrated in meeting this goal, and wholly devalues Student's classroom performance, as witnessed by his teachers. Gladys Gutierrez, Student's sixth grade

special education teacher, affirmed that Student regularly completed tasks with minor support, such as reminders. Gutierrez also noted that the baseline on the goal was fifth grade, but Student performed it in sixth grade, where the task demands were greater.

ISSUE 1A: DID THE IEP DATED NOVEMBER 14, 2018, AS AMENDED,  
DENY STUDENT A FAPE BY FAILING TO OFFER SUFFICIENT SPECIALIZED  
ACADEMIC INSTRUCTION

Student did not meet his burden of demonstrating that the November 14, 2018 IEP, as amended, failed to offer an appropriate amount of specialized academic instruction. Student noted that, in addition to push-in services, he received 300 minutes per week of pull-out services in his previous annual IEP of November 2017, which he did not receive in the November 14, 2018 IEP. Student contends that even with that amount of specialized academic instruction, he failed to make progress under the November 2017 IEP, in that he did not meet three of his four goals, and that his grades in fourth grade did not show that he was proficient in any subject except math. However, a preponderance of evidence reflected that Student is incorrect. Rather, Student met two of his four goals from the November 2017 IEP, and made appropriate progress on the other two. His fourth grade report card showed that his writing grades increased from emerging to developing over the school year, and many of his math grades improved as well. He declined in only one grade over the school year, as one of his math grades fell from the proficient category to the developing category. Contrary to Student's contention, the evidence reflected that Student made progress in fourth grade working under his November 2017 IEP.

In any event, Student did not demonstrate that the number of minutes of specialized academic instruction in the November 14, 2018 IEP were inappropriate,

simply because they were fewer than the number of minutes in Student's specialized academic instruction in the previous IEP. The evidence was uncontradicted that Student was taught in a fifth grade general education class, using the same fifth grade general education curriculum as his typical peers. He made progress on his annual goals throughout the 2018-2019 school year, and ultimately met all of them. His Lexile reading level increased from 530L, a third grade level range, to 760L, an end-of-fourth grade level range, by February 2019, in the middle of his fifth grade year. Additionally, Student's report cards showed he progressed in many subjects over the school year. By the end of the year, he raised every prior grade of 1 to a 2, and several grades of 2 to a 3. Only one numeric grade decreased, as his social studies score went from a 3- to a 2+. Student presented no evidence that any of his grades were inflated, or that he could not access the fifth grade general education curriculum with the amount of specialized academic instruction he received. Student presented no evidence as to the number of minutes of specialized academic instruction he contends he should have received.

There was no evidence as to why the IEP team excluded the 300 minutes of pull-out specialized academic instruction in Student's November 2017 IEP from Student's November 14, 2018 IEP, and no evidence that anybody on the IEP team, including Parents, objected at the IEP team meeting to this choice. There could be many legitimate reasons why the IEP team considered 300 minutes of pull-out services not to be necessary for a fifth grader in a general education class who passed all of his fourth grade classes, met two of his four goals in fourth grade, and made progress on his other two goals. This is especially so when Student only had three goals for fifth grade.

Under these circumstances, the specialized academic instruction in Student's November 14, 2018 IEP, as amended by the December 11, 2018 IEP, was reasonably calculated to allow Student to make appropriate progress and advance through the

general education curriculum, in conformity with *Rowley* and *Endrew F.* The IEP did not deprive Student of a FAPE on this ground.

ISSUE 1B: DID THE IEP DATED NOVEMBER 14, 2018, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER SERVICES IN THE AREAS OF OCCUPATIONAL THERAPY, EXECUTIVE FUNCTIONING, AND SPEECH AND LANGUAGE?

Student also failed to meet his burden of demonstrating that the November 14, 2018 IEP, as amended, deprived him of a FAPE because it failed to offer related services in the areas of occupational therapy, executive functioning, and speech and language.

With respect to speech and language, in 2016 the IEP team discontinued Student's speech and language services after a speech and language assessment by Bonnie Denny, a San Marcos Unified speech-language pathologist. At Student's next annual IEP team meeting, on November 17, 2017, the IEP team noted Student's communication skills were mixed. He spoke clearly and was understood by peers and school staff. Comprehension was an area of weakness but he could answer basic comprehension questions at a conversational level. Student struggled with figurative language, inferences, and pragmatic judgement, which impacted his verbal and written communication. How the November 2017 IEP team addressed that information is not an issue in this matter. However, Student contends, based on that November 2017 present level of performance, the November 14, 2018 IEP team should have provided Student speech and language services. The recognition of Student's weaknesses in communication a year before does not constitute credible evidence that Student required speech and language services as of the November 14, 2018 IEP team meeting. The IDEA specifically recognizes that special education, related services, present levels of

performance, goals, and placement, are all reconsidered anew every year, because they can, and do, change every year. Additionally, at the November 14, 2018 IEP team meeting, no IEP team member, including Parents, expressed concern about Student's speech and language. Nobody presented a speech and language assessment that showed Student had any need for speech and language services at that meeting, or at any time during the 2018-2019 school year.

Student contends that, since a speech-language pathologist provided services to Student after the assessment with respect to a writing goal in his 2020-2021 IEP, Student needed such services two years before, during the 2018-2019 school year. However, that evidence fails to support that Student required speech and language services in November 2018 or during the rest of the 2018-2019 school year. At hearing, San Marcos Unified's speech-language pathologists Bonnie Denny and Gina Pecile persuasively testified, based on their knowledge, experience, and assessments of Student, that they had no reason to doubt that speech and language services were appropriately terminated in 2016. Denny was a California certified speech-language pathologist since 2010, who held a certificate of clinical competence from the American Speech, Language, and Hearing Association also since 2010, and who was employed since that time as a speech-language pathologist by San Marcos Unified. Pecile was also a California certified speech-language pathologist, who held a certificate of clinical competence from the American Speech, Language, and Hearing Association, and was employed since 2013 as a speech-language pathologist by San Marcos Unified. Student presented no independent speech and language assessment or testimony from any speech-language pathologist that contradicted their testimony. Student failed to present persuasive evidence to support that he required speech and language services as of November 2018 and during the 2018-2019 school year to receive a FAPE.

Student's evidence was limited to Father's testimony. While Father believed Student needed speech and language services as a fifth grader during the 2018-2019 school year, Father was not a speech and language expert and his testimony was less persuasive than testimony from a speech language pathologists Denny and Pecile.

The "snapshot" rule of *Adams, supra*, requires that an IEP be evaluated based on the knowledge of the IEP team at the time the IEP was developed. There was no evidence that San Marcos Unified, as of November and December 2018, had any information that Student had speech and language deficits such that Student required speech and language services to receive a FAPE. There were no assessments, data, or concerns raised by Students' teachers, therapists, or Parents that identified speech and language as an area of deficit at that time. Student's educational progress during fifth grade also supports that conclusion. Finally, Student did not present later acquired information that would have established that San Marcos Unified knew or should have known anything different as to Student's speech and language needs.

Regarding occupational therapy services, school- based occupational therapy services were discontinued in November 2016, following an occupational therapy assessment as the assessment and the IEP team identified no needs requiring school-based occupational therapy services. By the November 14, 2018 IEP team meeting, Student's fine and gross motor skills were not an area of concern for any IEP team member, including Parents. No member of that IEP team, including Parents, presented an occupational therapy assessment to the team, or suggested occupational therapy was an area of deficit, at that IEP team meeting or during the 2018-2019 school year. There was no evidence that, at the time of the November and December 2018 IEP team meetings, San Marcos Unified had any reason to believe that occupational therapy was a need for Student. Again, the *Adams* "snapshot" rule requires an IEP to be evaluated



based on the knowledge of the IEP team at the time the IEP was developed. There was no evidence that the IEP team, as of November and December 2018, had any information that Student needed occupational therapy services. Finally, Student did not present persuasive later-acquired information that established that San Marcos Unified knew or should have known anything different as to Student's occupational therapy needs.

As to executive functioning, the November 2018 IEP, as amended, addressed Student's skills in this area in a variety of ways. First, the IEP included an assortment of accommodations to address executive functioning, including repeated, re-worded, or simplified instructions, breaking down information in manageable chunks, asking Student to paraphrase back in his own words to check for understanding, giving Student up to 50 percent extra time to complete tasks and assessments; use of graphic organizers for reading comprehension and writing assignments; a flexible schedule to allow Student breaks, different seating arrangements to support Student's ability to regain focus and sustain attention, and access to a separate setting for tests, assessments, reteaching, or when using extra time to complete assignments.

The IEP, as amended on December 11, 2018, also included an on-task, work completion goal to address Student's needs to understand directions and expectations and to improve his focus on his work. Student made appropriate progress on his goals and progressed academically during the 2018-2019 school year.

The foregoing illustrated that San Marcos Unified addressed Student's executive functioning needs in the November and December 2018 IEPs. Student failed to present expert testimony or assessment data to show that, based upon the information the IEP

team had at the time of these IEPs, Student required additional support or services in the area of executive functioning to receive a FAPE.

Related services must be included in an IEP if they are required to assist a special education student to benefit from special education. (Ed. Code § 56363, subd. (a).) Student did not meet his burden to demonstrate by a preponderance of evidence that he required occupational therapy, executive functioning, and speech and language services to enable him to benefit from his special education. The November 14, 2018 IEP did not deprive Student of a FAPE on this ground.

**ISSUE 1C: DID THE IEP DATED NOVEMBER 14, 2018, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER GOALS IN ATTENTION, ON-TASK BEHAVIOR, EXECUTIVE FUNCTIONING, AND READING?**

Student contends that the November 14, 2018 IEP ignored student's reading deficit and largely ignored Student's attention and executive functioning disorders. San Marcos Unified contended that the IEP included reading goals, and that the areas of attention, on-task behavior, and executive functioning did not require goals.

Student's contention that the IEP failed to address Student's difficulties with on-task behavior, attention, and executive functioning is unmeritorious. In response to Parents' inquiry as to whether Student had actually met his previous on-task/work completion goal, the IEP team reconvened on December 11, 2018, to revise the goal and include it in the amended IEP. The revised on-task/work completion goal directly addressed Student's ability to focus on teacher directions, and to focus on independently completing his work, all of which were executive functioning skills. Further, the IEP contained many accommodations designed to assist Student with

executive functioning skills, including attention. As stated above, goals are designed to enable the child to be involved, and make progress, in the general education curriculum. There was no evidence that, at the time of the November 14, 2018 IEP, as amended, Student required any other goal in executive functioning to progress in his fifth grade general education class, and access a fifth grade general education curriculum. Indeed, the evidence showed that, with his on-task/work-completion goal, his accommodations, his other goals, and his specialized academic instruction, he was able to do just that.

Student's contention that the IEP ignored Student's reading deficits is similarly unmeritorious. Student's two remaining goals centered on his reading skills, including reading comprehension. Goal 1 focused on math word problems, which required Student, by definition, to be able to read, to understand what he read, and to manipulate that information into a mathematical formula. Goal 2 was a literature goal that included reading. It required Student to read a fourth grade level text, understand it, and write a paragraph related to the text that introduced a topic, made a claim supported with clear reasons, cited relevant evidence, and elaborated on the reason.

Student presented no evidence that either goal was insufficient to meet Student's needs in reading. Brown testified that both of these goals were appropriate for Student. In math, Student benefitted from prompting, encouragement, and re-reading problems. The goal benchmark stated Student could solve word problems with 80 percent accuracy, and the goal required him to solve them with 85 percent accuracy as well as support his solutions through verbal or written responses. Goal 2 was appropriate because it addressed Student's needs in reading and writing. It required Student to read at a fourth grade level, to write a structured paragraph, and continue to work at a sixth grade general education content standard.

Student did not present any evidence that these goals were insufficient or would not meet Student's needs in reading. To the contrary, evidence showed that Student progressed in the area of reading. For example, Student's reading Lexile level and English language arts grades improved over the course of his fifth grade year.

Therefore, Student did not meet his burden of demonstrating by a preponderance of evidence that the November 14, 2018 IEP, as amended, deprived him of a FAPE by failing to include appropriate goals. Student's goals were appropriate and he appropriately progressed and earned passing grades in a fifth grade general education environment, on a grade level curriculum.

For all of the foregoing reasons, Student's November 14, 2018 IEP, as amended, was reasonably calculated to provide some educational benefit and enable Student to make appropriate progress in light of his circumstances. The IEP of November 14, 2018, as amended, offered Student a FAPE.

## ISSUE 2: DID THE IEP DATED NOVEMBER 12, 2019, AS AMENDED, DENY STUDENT A FAPE?

Student contends that the November 12, 2019 IEP, as amended, failed to offer Student a FAPE as it failed to offer sufficient specialized academic instruction, did not include related services in the areas of occupational therapy, executive functioning, and speech and language, failed to include goals in the areas of occupational therapy, behavior, executive functioning, attention, and task completion, and failed to include appropriate reading goals. As a result, Student contends that he failed to make appropriately ambitious progress under this IEP. San Marcos Unified contends that the IEP, as amended, offered Student a FAPE.

The IDEA provides that under certain conditions a parent is entitled to obtain an independent educational evaluation of a child at public expense. (20 U.S.C. §1415(b)(1).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent may request an independent assessment at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1), incorporated by reference into Ed. Code, § 56329, subd. (b).) When presented with an outside expert's report, a school district need only review and consider the report; it need not follow its recommendations. (*G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.) (*Westmoreland*).

## SAN MARCOS UNIFIED'S TRIENNIAL ASSESSMENT, FALL 2019

San Marcos Unified conducted Student's triennial psychoeducational assessment during fall 2019. Lauren Donatelli, the school psychologist performed the intellectual development and social emotional/behavior portions of the assessment. Gutierrez, Student's sixth grade special education teacher performed the academic portion of the assessment. Together, they prepared a multidisciplinary assessment report dated November 12, 2019.

The report included a summary of Student's developmental and health status, and his educational history. On an updated health and development form, Parent reported concerns about Student's reading and working independently.

Donatelli observed Student for 20 minutes in history class, during which Student was attentive and compliant during independent work time. During testing, Student put forth his best effort and cared about his performance. He second-guessed himself often

during the beginning of testing, and changed some of his answers. Towards the end of the testing session, Student appeared more confident in his choices.

Parents reported that Student was likable, made friends easily, and was strong in math. They were concerned about his speech articulation.

Student's teacher reported that Student attempted to keep up in his classes, and appeared to want to do well. Sometimes he would get distracted by his peers, and desired to fit in.

Donatelli interviewed Student, who discussed his interest in basketball. Student reported math was his strength and English language arts was his most challenging subject, but it was not too hard. He felt he had improved in reading, but did not like to read.

Donatelli measured Student's cognitive skills using the Kaufman Assessment Battery for Children, Second Edition, and the Woodcock Johnson Tests of Cognitive Abilities, Fourth Edition. He demonstrated below average cognitive skills overall. He demonstrated average skills in the areas of visual processing and comprehension/knowledge. He scored in the below average range in long-term retrieval, and in the below average to average range in fluid reasoning. He demonstrated average to above average skills in short-preterm memory on the Kaufman and the Test of Auditory Processing Skills, 4th Edition, which is a measure of language processing and comprehension skills. He demonstrated average skills in the areas of phonological processing and listening comprehension on this test.

Donatelli administered rating scales of the Behavior Assessment System for Children to Parent and an unnamed teacher. The Behavior Assessment measures

potential behavioral and emotional difficulties. Student fell in the at-risk range in the areas of hyperactivity and attention problems at home, and social skills and leadership at school. Donatelli also administered the Conners Third Edition rating scales to Parent and an unnamed teacher. The Conners measures behavior, in particular behaviors associated with attention deficit hyperactivity disorder. Scores in the elevated range reflect more concerns than typical, and scores in the very elevated range reflect many more concerns than typical. On the Conners, Parent gave Student scores in the elevated range in inattention and learning problems. Teacher gave Student scores in the very elevated range in inattention and hyperactivity/impulsivity, and scores in the elevated range in learning problems/executive functioning and defiance/aggression.

Gutierrez, Student's special education teacher during sixth grade, administered the academic assessment. She received a master's degree in education from the University of Illinois, Chicago, in 2001, and held a California Education Specialist CLEAR Level II credential. She was employed by San Marcos Unified since August 2016. Gutierrez administered the Kaufman Test of Educational Achievement to obtain Student's overall academic achievement in reading, math, and written language. Student's standard scores were in the average range on the academic skills battery composite, with below average range scores on the spelling and reading comprehension subtests; in the below average range on the reading composite; and in the average range on the math and written language composites. It is noteworthy that Student's standard score of 83 on the reading composite was barely in the below average range, as an 85 would have placed him in the average range.

Gutierrez also administered the Supplemental Composite of the Kaufman educational achievement test, which measured skills pertaining to reading and writing, and also included measures of reading, writing, and math fluency. Student scored in the

below average range on the sound-symbol composite, as he scored in the below average range on the phonological processing subtest. Here, his standard scores of 84 on the sound-symbol composite, and on the phonological processing subtest, were barely in the below average range, as a standard score of 85 would place him in the average range. He scored in the below average range on the reading fluency composite, as he scored in the below average range on the silent reading fluency subtest. He scored in the below average range on the reading understanding composite, and on the comprehension composite, because he scored in the below average range on the reading comprehension subtest.

Student also scored in the below average range on the spelling subtest. He scored in the average range on the decoding composite, the written expression composite, and the academic fluency composite, as he obtained average scores in writing, math, and decoding fluency.

Donatelli's assessment report concluded Student continued to meet the eligibility criteria of other health impairment. Based on Parent and Teacher ratings on the Conners and the Behavior Assessment, Donatelli concluded difficulty in the areas of inattention and hyperactivity impacted Student's performance in the classroom. When Student did not pay attention, he missed instruction or time to complete his work in class.

Donatelli also concluded Student did not meet criteria of specific learning disability, because Student demonstrated below average cognitive skills overall on standardized testing, as well as below average skills in long-term retrieval and fluid reasoning. He also demonstrated below average skills on the academic assessment, in reading comprehension, spelling, silent reading fluency and phonological processing.



He scored in the below average range for overall reading, phonological, and comprehension skills. Since the assessment reflected no discrepancy between Student's overall cognitive skills and academic achievement, the report concluded Student did not meet the criteria for specific learning disability. Donatelli's report noted Student's difficulty sustaining attention likely impacted his performance on some of the standardized testing, and that Student's educational program should address his difficulty in the area of attention.

### IEP OF NOVEMBER 12, 2019

On November 12, 2019, San Marcos Unified convened Student's annual and triennial IEP meeting. Student was 12 years old and in sixth grade. The IEP team included Parents, Bonnell, educational consultant Annette Mount, Donatelli, Gutierrez, administrator Katie Buffum, and physical education/general education teacher Kevin Smith.

Donatelli and Gutierrez reviewed the triennial assessment. Father said that there was no need to review the report in detail, as Parents received the report prior to the meeting. Donatelli shared the assessments used to determine eligibility. The team determined Student's primary disability was specific learning disability, and his secondary disability was other health impaired. The team discussed the continued presence of a processing deficit in long-term memory retrieval. Standardized testing showed no discrepancy between Student's cognitive abilities and academic achievement, but the team agreed that a discrepancy existed, based upon grades/classroom performance, and teacher/parent/tutor input. Father inquired as to how teachers addressed Student's memory deficit, and Gutierrez explained that she and other teachers worked on Student's memory issues using review and videos. Smith

added at times he had to repeat directions to Student. Mount believed that Student needed intervention for cognitive issues. The accommodations in Student's IEP, further discussed below, included techniques and strategies to assist Student's memory. They included strategies and techniques such as breaking up assignments into smaller tasks, using planners, repeating and simplifying instructions, and checking for understanding.

The IEP team described Student's strengths. He was an active and curious student, who was motivated to succeed academically and in basketball. He enjoyed class discussions and asked good questions. Student learned best when provided small group instruction, repetitions, reteaching, extra time to process information, and opportunities to use technology. Parents were concerned with the gap widening in his reading level. They wanted Student to improve his reading comprehension skills and his independent learning skills. They were concerned about the accommodations and modifications Student needed to succeed, as they were looking ahead to high school. Student's tutor believed that Student's reading comprehension improved with oral reading.

On the statewide Smarter Balanced Assessment, a standardized test that assessed common core academic standards, Student's overall score in the area of English language arts was Standard Not Met. He was Below Standard in reading, writing, and research/inquiry, and Near Standard in speaking and listening. In Math, he achieved a score of Standard Met, and scores of Near Standard in concepts and procedures, problem solving and data analysis, and communication reasoning.

The team considered Student's present levels of performance. As of November 8, 2019, Student had As in English language arts, history, inquiry, and physical education,

B in band, B- in math, and an F in science. Student ultimately raised his F to a higher grade, as shown below.

In language arts, Student obtained a Lexile score of 690 on the August 29, 2019 Lexile assessment. This placed Student in the third grade reading range. It represented a drop from his 760 Lexile score, representing an end-of-fourth grade reading range, that he achieved on the February 6, 2019 assessment. At hearing, Ms. Gutierrez commented that the 690 score was obtained at an assessment at the beginning of the school year, after summer break. She expressed that it was typical for all types of students, including typical peers, to score lower than expected on a test given at the beginning of the school year, after the summer break. The team also noted Student's triennial academic assessment scores on the Kaufman educational achievement test.

The team considered that Student struggled with comprehension and independently answering questions involving analyzing characters and determining themes. He had difficulties with "how" and "why" questions involving inferences and drawing conclusions on the author's purpose. He needed support to analyze a passage and locate text evidence to support his responses. He benefitted from repetition and prompts to reread a text, visual cues, and graphic organizers to help him with reading comprehension.

Student was learning how to write a paragraph that included text evidence to support his reasoning. He used a variety of graphic organizers to brainstorm and plan his thoughts. He needed support with explaining and analyzing a quote and text evidence, as well as editing for grammar, spelling, and punctuation.

Student's math computation skills were strong, as well his ability to problem solve using mathematical rules and ideas. He struggled with multi-step problem solving

and communicating his reasoning. He continued to benefit from visual, step-by-step modeling, a calculator, extra processing time, and talking aloud/sharing his thinking and understanding with a teacher before deciding what next step to take when solving problems.

In the area of communication, Student could speak clearly and was understood by teachers and students. There were no concerns in the area of speech and language. There were also no concerns with Student's gross and fine motor development. Student participated in general physical education, and he wrote legibly.

In the social emotional/behavioral area, Student had a good attitude about school and was a hard worker. He followed school and classroom rules and schedules independently. With participation guidelines and frequent check-ins, Student collaborated well with others to accomplish a task. He continued to need support with understanding others' perspectives, as well understanding how his comments could be perceived as negative by his peers. Student made good progress with sustaining focus, ignoring distractions, and completing work independently, but, as is discussed below, he did not meet his on-task behavior goal. He was able to initiate work promptly after directions were given. He continued to need frequent check-ins from instructional staff to ensure his understanding, and encouragement to move forward, as he tended to second-guess himself. Student was often unsure of his next steps, whether in writing or solving a math problem.

In the vocational area, Student made good progress in establishing good work habits that promoted his independence. He used a variety of internet and computer programs to complete assignments in all content areas. He was learning how to keep track of his assignments and grades with an agenda/planner and other systems. He was

working on keeping his binder organized. He improved in his ability to self-advocate, asking for help or clarification. He continued to benefit from extra time to process information, copying notes, frequent check-ins to ensure understanding, and reteaching/repetitions.

The team had no concerns with Student's adaptive or daily living skills, or with his health.

The team determined Student's areas of need were in language arts: reading and writing.

The team considered Special Factors, and determined there were none. The IEP provided Student would participate in the state Smarter Balanced Assessments with a variety of accommodations, including text to speech, noise buffers, a separate setting, and simplified test directions.

The team adopted three goals. Goal 1, a reading comprehension goal, required, given an instructional level text, graphic organizer, visual cues, and a teacher-led discussion, Student would answer reading comprehension questions involving inferences and/or character analysis with 75 percent accuracy on three out of four trials, as measured by teacher-charted data. Overall reading growth would be measured by district reading assessments, the Fountas and Pinnell and Lexile. Goal 2 was also a reading goal, which included the same parameters and conditions as Goal 1, except that the subjects of the reading comprehension questions were theme and/or author's purpose. Both of these goals referenced sixth grade English language arts state standards for literacy.

Both reading goals had the same baselines: Student's Lexile score of 690, his reading comprehension standard score of 81 on the Kaufman educational achievement test, and his average of 68 percent on curriculum-based comprehension quizzes. The baselines also included other factors mentioned in the present levels of performance, such as Student's struggles with independently answering questions about analyzing characters, plot elements, and determining themes.

At hearing, Gutierrez explained that 75 percent accuracy was not mastery, it represented a grade level understanding and progress towards mastery. She believed that if a student practiced the skills of a goal, and reached the accuracy level of the goal, the student made progress and was ready for the next goal. She also explained instructional level text for Student was a range of grade levels from third to sixth grade, but Student was learning a sixth grade curriculum. She believed these goals were measurable, as they required Student to answer a specified percentage of questions. They were also sufficiently ambitious, as they addressed the sixth grade state core literacy standard, and Student would work on sixth grade core content in his general education class. The accuracy rate of 75 percent in responding to reading comprehension questions, measured using a sixth grade core content curriculum with instructional level texts as high as the sixth grade level, was greater than Student's baseline of 68 percent accuracy in responding to reading comprehension questions. She considered Student capable of accessing the goal curriculum and content.

Gutierrez testified to her opinion that Student did not need any additional reading goals in this IEP. Her testimony was credible. She was an experienced special education teacher, and she also had personal knowledge of Student. She was not only Student's special education teacher during the 2019-2020 school year, but she also performed his triennial academic assessment.

Goal 3 was titled Writing-responding to literature. It provided that, after reading an instructional passage, following teacher-led discussion, and given a graphic organizer, Student would write a multi-paragraph composition that introduced a topic, made a claim supported with clear reasons, cited evidence, and elaborated or explained the reasons with 80 percent accuracy on three out of four trials, as measured by work samples or curriculum-based assessments. The goal referenced the sixth grade state core content standard in English language arts literacy, and goal progress was based on the sixth grade core curriculum.

The baseline for the goal was Student earning an average of 68 percent for single paragraph writing with no instructional support. on curriculum-based informal assessments. He struggled with independently using graphic organizers/outlines to develop a multi-paragraph composition, and with writing introduction and conclusory paragraphs. He had difficulty using transitional phrases between paragraphs, and editing his work for capitalization, spelling, and punctuation.

Gutierrez believed that this goal was appropriately ambitious, given Student's previous writing goal, and the baseline data.

Based on Student's grades and his academic assessment scores, Gutierrez did not believe Student required any additional goals. Her testimony regarding the appropriateness of all of these goals was credible, in view of her experience, credentials, and knowledge of Student.

The IEP offered numerous accommodations that were similar to those in the November 14, 2018 IEP. The IEP team added an accommodation to provide access to audiobooks, predictive text, and videos to reinforce content and vocabulary, and also added access to a visual checklist for writing/editing strategies, including specific

grammar forms, such as pronouns and past-tense verbs, and exempt Student from assignments when accessing IEP related services and assessments. Bonnell requested Student be able to get the notes from his teacher as needed, because sometimes he could not read his own notes. Gutierrez responded Student was allowed to request notes in every class as an accommodation. Both Bonnell and Parent requested clarification on homework, as Student often appeared to be working on it for several hours. Gutierrez reminded them of the accommodation that Student could let the teacher know he needed extra time to complete his homework and it would be provided. Gutierrez also explained if Student attempted homework and could not complete it all, it would not be held against him. Student had the same access to the curriculum as all students, but it could be modified as needed.

The IEP also offered modifications, including permitting Student to rework missed problems for a better grade, modified tests, such as no more than three multiple choice options, the opportunity to brainstorm with staff; and use of a graphic organizer, checklist, and outline before written assessment; use of recognition tests, such as true/false or multiple choice, instead of an essay for graded assignments and assessments, as applicable; use of a word bank for assignments that required filling the blank, option to use personal notes or open book assessments, as applicable; and in math, access to visuals/modeled examples for step-by-step problem solving before assessments, as applicable.

As did the previous annual IEP, this IEP offered consultation between special education instructional staff and general education staff for 30 minutes per week.

The IEP team placed Student in a general education class, with 250 minutes of small group specialized academic instruction weekly, on a push-in basis. This instruction



included small group English language arts, math, or other core content instruction, reteaching, extra time for assignment/assessment completion as needed. The IEP team also offered small group specialized academic instruction on a pull-out basis, for 50 minutes per week, to include the same areas as the push-in service. In both settings, the specialized academic instruction was provided by the educational specialist or a paraprofessional guided by the educational specialist.

Gutierrez provided the push-in specialized academic instruction, using school district-provided reading and writing grade-level core curriculum. The pull-out did not use a specific reading curriculum. Gutierrez used outlines and checklists to help Student write each paragraph, and modeled how to edit sentences.

The November 12, 2019 IEP was amended on November 15, 2019, to update the present levels of performance, goals and baselines. The updates were based on Student's most recent Lexile score of 875, obtained on November 15, 2019. Student's score fell at the end of the 5th grade reading range. The two proposed reading goals were also amended to delete the reference to "reading comprehension district reading assessments" and insert "Overall reading growth will be measured by district reading assessments (Fountas and Pinnell and Lexile)."

On November 20, 2020, Father sent Parents' signed consent to the November 12, 2019 IEP, as amended, to Gutierrez, along with a written request for independent psychoeducational, speech and language, and occupational therapy assessments. The parties communicated about Parent's request during the remainder of November. The parties ultimately agreed that San Marcos Unified would conduct the speech and language and occupational therapy assessments, and San Marcos Unified agreed to fund an independent psychoeducational assessment.

## SAN MARCOS UNIFIED'S SPEECH AND LANGUAGE ASSESSMENT

In January 2020, Gina Pecile, a San Marcos Unified speech-language pathologist, assessed Student in speech and language, and produced a written report.

Pecile's report noted Parents' concerns regarding the 2016 assessment and Student's ability to express himself. She summarized his previous speech assessment that formed the basis for Student's exit from speech services in 2016. That assessor, Bonnie Denny, concluded Student presented with adequate speech and language skills when compared with his peers, though his performance varied across assessments. Denny attributed his variable performance and many of his relative weaknesses to attention issues, as opposed to linguistic factors. Therefore, she concluded that Student did not meet criteria as a student with a speech or language impairment.

In performing her assessment, Pecile obtained Parent's input through a questionnaire and a checklist. Father reported Student often had difficulty articulating ideas, and Student lacked skills to self-advocate or to gain clarity on instruction. At home, he could go off-topic, and did not have a marked ability to follow directions. Father believed Student's speech was understood 85 percent of the time, even though he made some sound errors.

Pecile obtained teacher input by having Student's English teacher complete a rating scale regarding how well Student performed language-based academic tasks compared with his same-age peers. On a scale of 1 to 7, with 1 being Not Good, and 7 being Very Good, teacher rated Student as either 3, 4, or 5. Pecile also observed Student in his sixth grade science class for 20 minutes. At the beginning of the class, Student verbalized his ideas to the peers at his table group, and when his teacher

started talking again, Student continued to talk. He stopped talking when his teacher reminded him to stop talking. Student did not say anything further during the observation, and his attention wandered.

Pecile administered assessment instruments to Student over seven sessions of approximately 45-60 minutes each. He was cooperative and respectful, and engaged in reciprocal conversations with the examiner. He was able to expand on social responses and he occasionally asked questions. His attention was variable throughout testing. He required a moderate-maximal number of prompts or repetitions of stimulus items when allowed by test administration criteria. Pecile considered most of the prompts and repetitions were given due to Student's decreased attention.

Pecile administered the Comprehensive Assessment of Spoken Language-2nd Edition, a standardized measure that assessed Student's receptive, expressive, and pragmatic language skills. Student scored in the average range in all areas, except he scored in the below average range in sentence expression and grammatical morphemes. Pecile reported that Student scored low on the sentence expression subtest because he did not follow directions, and she therefore believed lack of attention may have been a factor in his performance. Pecile considered Student's low grammatical morphemes score to reflect relative personal difficulty with the test task, and she was not overly concerned with his low score. Her assessment revealed Student was able to create grammatically correct sentences as a whole, which she considered more relevant to the classroom than basic morphological tasks.

Pecile administered parts of another standardized measure, the Clinical Evaluation of Language Fundamentals, Fifth Edition, to assess Student's skills in the areas of syntax and pragmatics. Student scored in the average range given his

chronological age on the formulated sentences subtest, which meant he was able to formulate grammatically correct sentences. Father completed the Pragmatics Profile, a checklist of speech skills or intentions expected for interactions with peers and adults in school and social settings. Overall, Pecile viewed Father's input as suggesting, in a setting like the home or community, that Student had a relative difficulty consistently exhibiting pragmatic behaviors all of the time. This contrasted with Student's teacher's rating of Student's ability to interact with others as a 5 out of 7. Pecile considered it possible that Student had some relative difficulty consistently exhibiting appropriate pragmatic behaviors at home or in the community, but he was able to interact more appropriately with his peers at school.

Pecile administered the Pragmatic Activities Checklist, a criterion-referenced measure on the Evaluation of Language Fundamentals to gain information in an individual's functional verbal and nonverbal pragmatic skills. Student's performance suggested that, when participating in less-structured and non-standardized speaking tasks, he had some minor difficulties, but he still had functional pragmatic skills for his age. Overall, Pecile concluded Student's skills in social pragmatic application were typical for his age.

Pecile also administered the Pragmatic Language Skills Inventory, a standardized, norm-referenced teacher rating instrument. Student's sixth grade history and inquiry teacher, Charity Shepard, completed the scale. Shepard rated Student within the average range in classroom interactions, and, on the whole, Pecile concluded Student's ability to use appropriate pragmatic skills during classroom interactions was an area of personal strength. Combined with Student's scores on other measures in her assessment, Pecile evaluated Student as average in demonstrating appropriate pragmatic skills within the academic setting. Shepard scored Student in the below

average range in social interaction skills, which suggested that Student had some relative difficulties with fully implementing his pragmatic language knowledge to successful social interactions all of the time. Shepard rated Student in the average range in personal interaction skills, which suggested that Student was average, but had some personal strengths, such as his ability to develop interpersonal connections with peers through language.

Pecile administered another pragmatic language measure, the Social Language Development Test-Adolescent Normative Update, to assess Student's knowledge and awareness of pragmatic language in the areas of inferencing, problem solving, social interactions with peers, perspective taking, and interpreting nonverbal cues. Student's scores on this standardized test were all in the average range, except he scored in the below average range on the making inferences subtest. Pecile considered this an area of relative personal weakness. Student's index score on this measure placed him within the average range.

Pecile also informally assessed Student's speech and language, based on an informal interview of Student and her observations throughout the assessment process. His voice was within typical limits as to quality, rate, and volume. He was able to produce all expected phonemes for his chronological age at the conversation level. He was 100 percent intelligible. He did not present with a fluency disorder.

Pecile concluded that Student had an array of overall relative communicative strengths and weaknesses. His strengths included semantics, syntax, understanding figurative language, social problem solving, and using age-appropriate social skills within the academic setting. Areas of relative weakness included listening comprehension of lengthier pieces of information, making inferences, consistently

applying appropriate social behaviors in the home and community, and speaking at appropriate times in the classroom. She considered the eligibility criteria for speech and/or language impairment pursuant to the California Code of Regulations, and determined that Student did not meet them.

## SAN MARCOS UNIFIED'S OCCUPATIONAL THERAPY ASSESSMENT

In January and February 2020, Alisa Adams, an occupational therapist employed by San Marcos Unified, conducted an occupational therapy assessment of Student. She generated a report dated February 18, 2020. Adams began employment as an occupational therapist with San Marcos Unified in July 2019. From July 2014 to June 2019 she was employed as an itinerant occupational therapist by the San Diego County Office of Education. She received her master's degree in occupational therapy from the University of Indianapolis in December 2013, and was certified by the California Board of Occupational Therapy and the National Board of Occupational Therapy.

Adams noted Parents' concerns regarding his attention to task and fine motor development. The purpose of the assessment was to determine whether Student experienced fine motor and/or sensory processing difficulties that impacted his access to his educational curriculum.

Adams reported Student's background information, and summarized Student's history of occupational therapy services. San Marcos Unified assessed Student for occupational therapy as part of Student's triennial assessment in 2016, and the occupational therapist recommended his school-based occupational therapy be discontinued, as Student could produce legible handwriting and the assessment identified no other needs requiring school-based occupational therapy services. The IEP

team accepted the recommendation. Adams also summarized the services, accommodations, and modifications in Student's November 12, 2019 IEP.

For the assessment, Adams observed Student in his inquiry class for approximately one-half hour, and, on another day, she observed him in his language arts class for approximately one-half hour. In the inquiry class, Student was engaged and cooperative. He was able to independently navigate his computer and its software. He helped a peer access the class resume-building activity on the computer. Student went up to the teacher's desk to ask a question, and then returned to his seat. He talked to the peer next to him, and the teacher instructed the entire class not to talk to each other. Student followed directions and returned to working on the resume activity. He typed using his bilateral index and middle fingers. When the resume was completed, Student began to copy it to a Google document, switching between the screens. He could copy and type from four letters up to four words at a time before switching screens to look back at the model. He independently corrected spelling errors. Student did not engage in sensory-seeking or sensory-avoiding behavior during the observation. He appeared on task and attentive, and no environmental features appeared to negatively impact his access to the curriculum and his participation in the classroom.

During the observation in language arts class, Student's teacher presented a whole class lesson at the front of the room and wrote on the board. His teacher asked a question, and Student raised his hand. He answered the question appropriately when called on. He was actively paying attention and copying from the board into his notebook. He followed the whole class verbal instruction without requiring any additional prompting. He appeared focused and alert with good posture in his chair. Student sat still and did not demonstrate any movement-seeking behavior. When his teacher instructed the class to work in table groups, Student appeared to contribute to

the group and demonstrated on-task behavior. Then teacher instructed the students to get individual Chromebooks and complete an activity. Student followed directions, and independently logged-in to access the assignment and start working. Overall, Student did not demonstrate any sensory-seeking or sensory-avoiding behaviors during this observation.

During testing on January 31, 2020, Adams administered occupational therapy tests to Student in two separate sessions in a quiet office at Student's school. Student was cooperative throughout, and she believed he gave his best effort to complete the tasks, even those that were challenging. He demonstrated good attention to tasks and task completion without requiring additional prompting after initial instruction.

Student had functional range of motion, muscle tone, and strength. He was able to access and use classroom supplies and participate in all activities in the classroom.

In the fine motor area, Student used an irregular right-handed grasp of his pencil, with an extended thumb and all fingers on the pencil shaft with the index finger in a hooked position. This grasp limited finger movement while writing, with motion primarily at the wrist and arm, which could contribute to decreased precision and hand fatigue. Student demonstrated age-appropriate grasping patterns on other objects varying in size. Student also demonstrated functional in-hand manipulation skills.

Student took care of all basic hygiene needs independently, and demonstrated the ability to complete all simple clothes fasteners.

Adams assessed Student's educationally relevant visual-motor skills, and found no deficiencies. Student legibly wrote numbers and lower and upper case letters. He visually smoothly tracked in the horizontal, vertical, diagonal, and circular planes. His



eyes appropriately converged when a moving object moved closer to his face, and diverged when the moving object moved away from his face.

Adams tested Student's handwriting/copying skills using the Wold Sentence Copying Test. The Wold is a timed test that evaluates rate of writing. Student's copying speed of 59 letters per minute was within the normed range for sixth graders. He was able to copy 1-2 words at a time before looking back at the model. Student copied accurately with neat and legible handwriting. Student briefly rolled out his hand and wrist during this writing task. After he completed the task, Adams asked Student if he experienced hand pain or fatigue when writing at school. Student replied that his hand became tired only when he was trying really hard and he usually just gave his hand a break when writing. He also advised Adams that he types longer assignments in the classroom. Student was able to type, using his bilateral index and middle fingers and had his hands appropriately placed in an approximation of home row positioning. He completed three one-minute timed typing trials with an average typing speed of 29 words per minute with 96 percent accuracy, which was an appropriate typing speed for sixth graders. Student demonstrated familiarity with typing skills such as capitalization, punctuation, spell check, and voice typing.

Adams administered the Wide Range Assessment of Visual Motor Ability, a standardized assessment of visual-spatial, fine motor-and integrated visual-motor skills, which were three skill areas needed for academic tasks. Student scored within the average range on the drawing visual-motor, and matching visual-spatial subtests. He scored slightly below average on the pegboard fine motor subtest, but his score significantly increased from previous testing. The report noted that it was amended on May 11, 2020, to specify that the dominant hand score was used to determine the

pegboard's fine motor standard score. This was the hand involved in written tasks, and usually the area of diagnostic interest for a school-based assessment.

Adams also administered the Fine Manual Control composite of the Bruininks Oseretsky Test of Motor Proficiency, Second Edition, to assess Student's control and coordination of the hands and fingers, especially for grasping, writing, and drawing. Student scored in the average range on this measure. At hearing, Adams explained that the results on this test demonstrated Student was able to produce precise and accurate pencil and paper tasks, and able to copy accurately from a model.

Adams also administered the Sensory Processing Measure, a standardized assessment for two higher-level integrative functions: praxis and social participation. The measure also assesses five sensory systems: visual, auditory, tactile, proprioceptive, and vestibular functioning. Adams administered the measure's rating scales to Shepard and Parent. Adams chose Shepard for the teacher ratings because she was Student's teacher in two of his classes at the time, and she therefore had more exposure to him than his other teachers. The ratings fell into one of three interpretative ranges: Some Problems, Typical, and Definite Dysfunction. Both teacher and Parent rated Student in the Some Problems range on the vision scale. Teacher reported Student was frequently distracted at school by nearby visual stimuli and looked around or at peers during instruction instead of at the board or instructor. Teacher rated Student in the Typical range in all other scales. Besides the vision scale, Parent also rated Student in the Some Problems range in the touch and social participation scales. Additionally, Parent rated Student in the Definite Dysfunction range in the praxis scale, which measured planning and ideas. Based on subtracting Parent and Teacher's respective Total Sensory Systems T-Score ratings, Adams calculated that there was no difference in the amount of problems between home and Shepard's classroom.

Adams informally interviewed Student regarding his sensory status at school. Student had no difficulty sitting still in class. He was not bothered by loud noises, the feel of his clothes, or by touching certain textures of school supplies. Adams concluded Student had no fine motor or sensory issues requiring special education occupational therapy services. The testing did not reveal any praxis issues. He appeared to function as a general education student.

Adams summarized her results. She noted in her report that related services such as occupational therapy were directed toward the achievement of functional tasks required to participate and benefit from special education placement. Consequently, school-based occupational therapy assessments were not done from the perspective of a deficit model, which looked for areas not fitting a normal standard. Rather, her assessment took into consideration only needs associated with the child's educational program. At hearing, Adams reiterated that as an occupational therapist in the school setting, she was concerned with any deficiencies that impacted Student's schoolwork. She looked at the tasks Student was expected to perform in the school environment, and how to support Student's ability to perform those tasks at school. For Student, supports did not have to include specific occupational services and goals. Student was appropriately supported by his IEP accommodations. In her opinion, occupational therapy services were not an area of need for Student at school. Adams testified clearly and knowledgeably. Based upon her experience and training as a school-based occupational therapist, and her assessment of Student, her testimony and opinions were credible.

San Marcos Unified scheduled an IEP team meeting to occur on February 12, 2020, to discuss the results of the speech and language and occupational therapy evaluations. Parents requested the meeting be postponed until after the independent

psychoeducational evaluation was completed. Therefore, San Marcos Unified rescheduled the meeting for April 14, 2020.

## DR. GRAY'S INDEPENDENT NEUROPSYCHOLOGICAL ASSESSMENT REPORT

Robert Gray, Ph.D. and Jessica Lenihan, Psy.D., a Pediatric Neuropsychology Fellow, performed an independent neuropsychological assessment of Student in February 2020, and produced an assessment report dated March 17, 2020.

Dr. Gray was a California licensed psychologist. He received his bachelor's degree in psychology from the University of Texas at Austin, his master's degree in an accredited educational psychology program at the same institution, and his doctorate in an accredited school psychology program at the same institution. He served a two-year post-doctoral fellowship in pediatric neuropsychology at the University of Minnesota Medical School, Division of Pediatric Neurology/Pediatric Neuropsychology. He served as a consulting pediatric neuropsychologist at Rady Children's Hospital, San Diego, and was the Clinical Neuropsychologist/Director, Pediatric Neuropsychological Services, Advanced Neurobehavioral Health of Southern California.

Dr. Gray reported Student's history of speech and fine motor developmental difficulties, and ongoing concerns regarding Student's academic and learning progress and variable attention and executive functioning skills. Parents retained him to obtain information regarding Student's current neuropsychological strengths and weaknesses, and to assist with diagnostic clarity and appropriate treatment and interventions. Dr. Gray obtained historical and background information from Father.

Dr. Gray reported that Student was in sixth grade, and there were consistent concerns regarding his planning, organization, and short-term memory. Dr. Gray mistakenly reported Student did not use a planner to assist with organization. Student's private tutor noted Student demonstrated strengths in math, but he required repetition of instruction, extra time to understand materials, assistance with organization of written output, and he struggled with inferences and reading comprehension. His tutor reportedly worked on independent work skills, organization, and written expression.

Dr. Gray summarized Student's IEP of November 12, 2019, and Student's 2016 San Marcos Unified psychoeducational, speech and language, and occupational therapy assessments. He noted it was unclear from the assessments whether grade or age-based norms were used. Dr. Gray wanted to use grade-based norms, which he believed were more accurate, since Student had been retained in first grade.

Dr. Gray observed Student was cooperative, polite, and hardworking throughout the testing, taking breaks as needed. He made good eye contact, and his overall basic expressive and receptive language were typical. Dr. Gray noted periods of inattention, and Student required repetition and clarification of instructions at times. Student commented he often over-thought instructions, which, to Dr. Gray, reflected Student's struggle to efficiently comprehend the main agenda/objective of the task. Student demonstrated a variable work pace, at times working very slowly and at other times impulsively responding. When provided time, he often completed tasks accurately. On reading tasks, he sought clarification on statements to ensure he understood the task or what he read. Dr. Gray asserted Student demonstrated good effort on the assessment.

The assessment occurred on one day, over the course of five hours, including breaks. Dr. Gray assessed Student's cognitive functioning using the Wechsler

Intelligence Scale for Children-5th Edition. Student's full-scale IQ score of 93 fell within the average range. Student performed within the below average range on measures of nonverbal reasoning, and on measures of visual motor processing speed.

Dr. Gray used a variety of assessment measures, including standardized tests, rating scales, test observations, and Student and Parent interview. He assessed Student in a variety of areas, including auditory attention, executive functioning, verbal memory, fine motor speed and dexterity, academic functioning, and behavior, emotional, and social functioning,

Dr. Gray reported Student had strengths in many areas, including average range performance on measures of overall intelligence and reasoning. Student demonstrated weaknesses on measures requiring fine motor speed and dexterity, visual motor processing speed, reading and academic fluency skills, verbal memory, sustained attention, and executive functioning. One prominent area of concern for Dr. Gray involved Student's persistent problems with fine motor skills, as he worked slowly on such tasks, but his work was often accurate. He also performed poorly across processing speed tasks that featured a combination of motor and cognitive processing demands under timed conditions. Student typically performed within the average range on speeded processing tasks with reduced motor demands, consistent with his fine motor deficits. Dr. Gray did not believe gross motor skills were an area of concern.

Dr. Gray considered whether Student had core executive skill deficits, and reported Student's current symptoms were not severe enough to yield the level of persistent functional impairment across settings consistent with a diagnosis of a disorder such as attention-deficit hyperactivity disorder. He did not believe Student had a core memory deficit.

Dr. Gray concluded Student had average range functioning across all academic areas including reading fluency and comprehension, except for notable difficulties with math fluency. Dr Gray was uncertain as to whether Student's performance reflected accurate grade-based comparison, or positive improvement in response to multiple school and private interventions.

Dr. Gray did not diagnose Student with any disorder. His report concluded with numerous recommendations, including continued provision of special education services; extended time to complete tasks; minimizing the use of timed tests; use of technology; math fluency interventions; math and reading comprehension strategies; critical thinking skill exercises; and strategies to increase Student's attention, comprehension of instructions, and retention of instruction. He also recommended memory strategies; strategies to assist Student with planning and organization of written expression, including specific validated formal instruction programs; time management techniques and tools, homework modification to enable timely task completion; and an in-school homework period with time to ensure that Student had the necessary materials, and understood assignments and due dates prior to leaving school for the day. Dr. Gray recommended engaging an educational therapist to work on strategies to address Student's struggles with reading comprehension, written expression, academic fluency, and independent work skills. In recommending educational therapy, Dr. Gray acknowledged that Student demonstrated average range performance in core academic content areas, but struggled with reading comprehension, written expression, academic fluency, and independent work skills.

Dr. Gray did not perform a school observation, and did not interview any of Student's teachers, even though Student was still attending school in-person at the time of Dr. Gray's evaluation. Dr. Gray received teacher input on the Behavior Assessment

rating scale, but not on the Inventory of Executive Function. Dr. Gray's failure to obtain firsthand or direct information about Student's functioning at school diminished the value of his recommendations as to the educationally-related services Student required. Further, a number of his recommendations were already included in Student's IEP accommodations, or otherwise incorporated into the specialized academic instruction Student received at school. For example, Student's November 2019 IEP, as amended, and the instruction he received in conjunction with it as they existed at the time of Dr. Gray's assessment, included extended time for tests and assignments, teacher discussions about the texts he read, chunking of assignments, repetition of directions and assignments, having Student paraphrase instructions in his own words, offering multiple formats for tests and assignments, such as multiple choice; use of technology; use of graphic organizers, and frequent feedback on writing assignments. Student had access to a visual checklist for writing, including specific grammar forms. The goals and instruction also addressed his reading comprehension, written expression, academic fluency, and independent work skills.

## MAY 2020 IEP AMENDMENTS

In March 2020, at about the time Dr. Gray completed his assessment report, San Marcos Unified began to conduct classes remotely by videoconference, due to the COVID-19 pandemic. This process was also called distance learning. On May 11, 2020, San Marcos Unified convened an amendment IEP team meeting, by videoconference, to review Dr. Gray's assessment, as well as its speech and language and occupational therapy assessments. The IEP team included Parents, their attorney, special education coordinator Tami Pico, school psychologist Alexis Alegre, Adams, Pecile, Gutierrez, Assistant Principal Katie Buffum, Dr. Gray, and Student's general education teacher Kendyl Leuschen. Dr. Gray reviewed his assessment and recommendations. The team



reviewed the IEP services page, including supports and accommodations. The team agreed to conduct an assistive technology assessment when school re-opened for in-person classes.

Adams reviewed her occupational therapy assessment report, and the team discussed support and accommodations regarding fine motor and sensory issues. The team scheduled a second meeting, which was held on May 18, 2020.

The attendees at the continued IEP team meeting included Parents, their attorney, Pico, Gutierrez, Student's general education teacher Charity Shepard, Pecile, Adams, Alegre, and Buffum. The meeting was held by videoconference.

Shepard shared that Student was academically determined. He was motivated to do well. Sometimes he rushed through assignments to finish them. He was able to self-advocate and would ask for help when needed. Student participated in large group discussions and worked well with his peers. He participated well in distance learning and was completing his assignments. Parent asked for clarification regarding Student's writing. Gutierrez responded that Student was able to complete his writing assignments, asked clarifying questions, and used the same tools offered to other students. He had access to multiple organizers. Parent commented that Student was taking longer to complete writing tasks and often required parental support to complete distance learning assignments. The educational professionals on the team suggested using a timer and/or having Student ask teachers for more clarification on tasks. Shepard advised that Student was doing more than he needed to do on the assignments, and suggested that was why it was taking him longer to finish them.

Pecile reviewed the speech and language assessment, and Parents' questions were answered. Student did not meet eligibility criteria as a student with a speech and

language impairment, but he had personal strengths and weaknesses. The team discussed tiered interventions to address pragmatics. At times, Student would speak out of turn, make inappropriate comments, and interrupt those speaking. Typically, this was addressed through reminders and reteaching. At hearing, Pecile commented that teachers could provide such reminders and reteaching, as these need not be performed by a speech-language therapist.

Pecile listened to teacher and Parents input at the meeting, and learned that Student struggled with organizing his language and clearly expressing his thoughts. She did not believe he needed a separate speech and language goal to address any area of need. Rather, since he was in all general education classes, she wanted to focus directly on the academic area of expressive language to address his challenges. She concluded it was appropriate for her to work with Student on his writing goal, and help him with writing and the writing process. Therefore, Pecile recommended speech and language services to assist with Student's writing goal.

In view of the results of the occupational therapy assessment, the San Marcos Unified IEP team members did not believe Student required direct occupational therapy services. Parent shared concerns about Student's organization and planning skills. The team discussed using online classroom resources, a calendar, and email to plan when assignments were due. Gutierrez requested that Student sign up for individual office hours so teachers could support him with working on and completing assignments. The service and goal pages were updated to reflect speech-language pathologist pull-out individual services of 480 minutes per year, which amounted to a total of 30 minutes per week during the period from May 18, 2020 to November 10, 2020, to work on Student's writing goal. The goals pages also included progress reports on Student's goals, which reflected he was making progress on all of his goals.

The team added several accommodations to Student's IEP, many of which were based on recommendations in Dr. Gray's assessment report. For example, the new accommodations included use of a graphic organizer with additional sentence frame starters, color coding, and similar features as needed to support writing and work completion; providing a copy of class notes or note-taking supports, and providing Student with specific directions on how to request these notes and guidance on how to use them; giving Student the option of using his personal device to take images of class notes or problem-solving examples; assisting Student to develop a specific routine for assignment completion; and providing weekly check-ins to review online grades and assignments. The accommodations also included guiding Student to create short-term and long-term goals by using timers and checklists, and devising actions to meet those goals.

On June 18, 2020, Parents' attorney wrote to San Marcos Unified, conveying Parents' consent to implement the IEP, as amended at the May 11, 2020 and May 18, 2020 team meetings. Counsel included requests for a variety of additional accommodations, instruction, and programs based on Dr. Gray's findings, an assistive technology assessment, a request for reimbursement for Student's tutoring, and a request for an independent educational evaluation in occupational therapy. By letter dated June 29, 2020, Tami Pico, San Marcos Unified's special education coordinator, declined most of Parents' requests, but agreed to conduct an assistive technology assessment when students returned to school in the fall, and to fund an independent occupational therapy assessment. As a result of receipt of parental consent to implement the IEP as amended, San Marcos Unified began to provide speech and language services to Student at the beginning of the 2020-2021 school year, to support Student's writing goal.

## INDEPENDENT OCCUPATIONAL THERAPY ASSESSMENT

On July 22, 2020, Sara Feeney conducted an independent occupational therapy assessment of Student, and thereafter wrote an assessment report. Feeney is a pediatric occupational therapist who received her bachelor's degree in psychology with a minor in occupational science from the University of Southern California, and a master's degree in occupational therapy in 2016 from Tufts University. In 2017, she was licensed as an occupational therapist in California, and became certified by the National Board for Certification in Occupational Therapy that same year. She was employed by San Diego Occupational Therapy since 2017, first as an occupational therapist, and since 2020, as a clinical supervisor and occupational therapist. Feeney provided clinical services. She performed independent educational occupational evaluations and attended IEP team meetings, but had no experience providing services in an educational setting.

Feeney' reviewed Student's records and reported Parents' concerns. Parents told her Student demonstrated increased levels of inattention and hyperactivity that affected his school performance. They reported he could be impulsive and easily distracted when asked to engage in schoolwork, and took frequent breaks when working on focused activities. They were also concerned about his speech, which they felt lacked articulation. They believed Student took more time than peers to get ready, and that he struggled to maintain a daily routine and follow multi-step procedures. He could be forgetful, and struggled to follow verbal instructions. Parents also reported he sought tactile input at home.

The assessment occurred in a clinic setting over the course of two hours during the same day. Student easily transitioned independently into the testing environment. He was appropriately talkative and engaged with the assessors, but he was subject to

fatigue because he had completed an intensive basketball practice earlier. Student completed all assessment tasks without resistance, and Feeney believed that the assessment results accurately reflected his current functioning.

Feeney assessed Student's motor development and abilities by administering the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition. His scores fell in the above average range for his age for fine motor integration, and in the average range for his age for upper-limb coordination. He scored in the below average range for fine motor precision, manual dexterity, and bilateral coordination. He scored in the well-below average range for balance. Feeney found that Student's pencil grasps alternated between a quadruped grasp and a five-finger digital grasp with his thumb hyperextended and his index finger flexed around the pencil. He demonstrated moderate difficulty with impulse control, as he started some tasks prior to being given directions, and he started at the wrong place on a maze. He performed slowly on timed tests.

Student scored in the average range for his age on a measure of visual perceptual and visual motor skills, reflecting that his visual perceptual skills were age-appropriate and did not impact his academic functioning.

Student's scores on a measure of his ability to identify reversals within images, letters, numbers, and words suggested he had difficulty with left-right discrimination. He required multiple repetitions of the directions, and benefitted from step-by-step explanations and examples. Feeney's report noted that Student's significant difficulties with vestibular discrimination could also impact his left-right awareness. At hearing, Feeney commented that Student's difficulties with his vestibular system could affect his postural muscles, his ability to coordinate muscle movement, sequencing, left-right

discrimination, and arousal, all of which could impact Student's educational performance.

Feeney assessed student's executive functioning skills using the Behavior Rating Inventory of Executive Function, Second Edition. The rating scales were only completed by Mother. Feeney did not request that any of Student's teachers complete the rating scales, nor did Student complete the self-report rating scales. Mother's concerns were most evident on the areas included in the cognitive regulation index, as Mother rated Student as potentially clinically elevated or clinically elevated in all index areas except for the organization of materials area. Feeney considered these areas to require significant ideation, initiation, and sequencing demands. She believed that improving Student's abilities in these areas would help support Student's ability to complete higher level academic tasks.

Feeney further explored Student's executive functioning skills using the Adaptive Behavior Assessment System, Third Edition. This instrument consisted of rating scales, which Feeney only administered to Mother. Mother's ratings gave Student a composite score in the average range on this instrument. This test had a functional academic component, but Feeney did not administer any of its rating scales to Student's teacher or to Student. Feeney believed that since Student was engaged in remote learning, his teachers were not observing his occupational therapy skills.

Feeney gave Student a topic, and had Student independently write a three-sentence paragraph. After the first sentence, Student needed cuing to continue, as he had difficulty with ideation. The first two sentences were related, but she considered him to have difficulty connecting the third sentence to stay on topic. His handwriting was legible, and he used age-appropriate sizing and spacing between words, but he

inconsistently capitalized letters in the middle of a word, and inconsistently placed his letters on the line.

Feeney assessed Student's sensory processing abilities using several measures. She administered the Tests for Auditory Processing, which reflected his skills were normal. He demonstrated mild difficulty with impulse control during this assessment, as he guessed and initiated tasks before full instructions were given.

She clinically observed Student's postural-ocular status and vestibular processing. Parent reported on Student's sensory status, noting that Student was over-responsive to tactile input at times, and often easily distracted and impulsive. Combined with Feeney's observation that Student was over-responsive to vestibular input, Feeney concluded Student had difficulties with sensory modulation, which could affect Student's arousal, attention, and engagement at school. Feeney concluded Student had difficulty with sensory discrimination, which could impact Student's sequencing for novel school-related tasks.

Feeney observed Student's difficulty discriminating between vestibular and auditory input likely contributed to his difficulty responding to verbal cues, as well as his difficulty with left/right awareness.

Feeney concluded Student had dyspraxia. She based this conclusion on Parent report that Student had difficulty with planning and organization, and Feeney's observations that Student had difficulty with sequencing, novel tasks, and multi-step tasks, as well as his need for additional cuing and visual models to complete tasks. Dyspraxia is an impaired ability to conceive of, plan, sequence, or execute novel actions. Her report described a variety of ways in which dyspraxia manifested. In the classroom,

she considered dyspraxia to implicate difficulties with organization, executive functioning, and following verbal instructions.

Her report contained several pages of "Goal Areas and Recommendations" to address postural stability, bilateral motor coordination, motor planning, executive functioning, time management, fine motor skills, letter reversals and left/right awareness, sensory processing, and integration. These were areas in which Student had a deficit or difficulty, based on her assessment. She recommended more than 35 strategies, techniques, devices, and supports to address these areas, including "skipping" and "completing reading tasks during movement tasks (i.e., on a swing)." She recommended direct services of at least 30 minutes per week to address sensory modulation and discrimination, letter orientation, visual perceptual skills, executive functioning, and praxis. Further, Feeney suggested Student would benefit from the use of suspended equipment and a sensory integration approach combined with sensorimotor strategies and possible accommodation for some academic requirements.

Feeney's report and testimony warrant little credibility with respect to Student's need for occupational therapy in school. Feeney performed her assessment over the summer, and therefore she did not observe Student in his distance-learning school setting. She did not seek or obtain any input from Student's teachers as part of her assessment. Adams expressed that it was important for an occupational therapy assessor to observe a student in a classroom to see what tasks Student had to be able to perform during his daily classroom routines. Adams also emphasized that, clinic-based occupational therapists, such as Feeney, look for areas of need simply based upon below-average skills. In contrast, school-based occupational therapists, such as Adams, look at what tasks a student actually needs to perform in school, and how occupational therapy can support the skills a student needs to perform those tasks.



Adams also questioned some of Feeney's findings and recommendations. During Adams's classroom observations, Adams did not observe inattention or hyperactivity. She considered that Feeney's administration of all of the assessments in two hours could lead to rushing, or increase Student's fatigue, and this could have led to the attention issues Feeney reported. Adams did not share Feeney's concerns with Student's postural stability. Adams considered postural stability a gross motor component, as was sensory input. Since Student loved playing basketball in his free time, and his favorite class was physical education, Adams was not concerned with Student's postural stability. Similarly, Adams observed that children with praxis issues often were physically uncoordinated, and Student was not physically uncoordinated.

Adams also considered some of Feeney's recommendations to be inappropriate or unnecessary for Student. For example, Feeney's recommendations regarding bilateral motor coordination, such as skipping, and reading while on a moving swing, were not activities in which Student engaged as a middle school student in a general education class. Adams did not observe that Student had difficulty with left-right awareness, or that it had any educational impact. Adams also noted that many of Feeney's recommendations regarding motor planning, fine motor skills, and sensory processing and integration, were addressed by Student's IEP accommodations and the technology he used at school.

Adams was an experienced school-based occupational therapist, who had observed Student in class, obtained teacher input during her assessment, and understood the tasks Student was required to perform at school. Therefore, her report and opinions were more credible than Feeney's.

## SEPTEMBER 10, 2020 IEP TEAM MEETING

On September 10, 2020, when Student had just begun seventh grade, San Marcos Unified convened an IEP team meeting by videoconference to review Feeney's occupational therapy assessment results. The team included Parents, their attorney, Feeney, Adams, special education teacher Rikki Kuykendall, general education teacher Natasha Walls, Buffum, and Denny.

Feeney reviewed her assessment results and shared how some areas of low scores could impact Student in the classroom setting. Questions were asked and answered, and the team discussed recommendations for supports and accommodations Student needed to be successful. Walls commented that Student was able to self-advocate, participated in class discussions, and would access teacher office hours or other opportunities offered for help. Student submitted all assignments and tasks thus far. Adams stated Student had several supports to address his needs. Feeney recommended pull-out occupational therapy service to address self-regulation strategies, or for planning, making checklists, and helping Student to break down assignments. Adams asserted at the meeting that self-regulation was not an area of need for Student such that he should be pulled out of his general education classes. Adams also commented that the special education teacher was better able to help Student with planning and organizational tasks, as she knew what his assignments were. The IEP team did not agree with Feeney's recommendation for direct occupational therapy in light of his educational progress.

## STUDENT'S PROGRESS UNDER THE NOVEMBER 12, 2019 IEP

Student had multiple sixth grade general education teachers during the 2019-2020 school year, as each of his middle school subjects were mostly taught by different

teachers. Shepard, who testified at hearing, taught Student's sixth grade world history class, and also his inquiry class. Inquiry was a class that taught students about entrepreneurship. The students worked as a team, formed businesses, and used skills such as reading, writing, and public speaking. History also involved reading and writing, as well as intensive use of vocabulary.

Student performed well in both classes. He was engaged, attentive, and focused. He participated in class, completed all assignments, and worked well with the other students. Shepard considered Student to function academically as a typical peer. He was able to access the general education sixth grade curriculum, with some minor supports. Shepard assisted him in improving his writing assignments, and he sometimes had difficulty stopping to listen to others. She used some of his accommodations, such as checking-in with her about assignments, giving him videos to help support his comprehension of a concept, and using a sentence frame to help him write. She measured his progress in world history based on general education standards, and he had to master grade level content to earn the grades he received in both classes.

Gutierrez, Student's sixth grade special education teacher, helped him with writing, using a school district curriculum that used outlines and checklists to help him write each paragraph, and she modeled how to edit. She provided reading comprehension support in the classroom. She confirmed Student was working on a grade level core curriculum, and he needed only mild support to access it.

Student's task completion was appropriate. He could organize his assignments and complete work. Student used a planner and wrote his assignments in it. He understood he had to complete his academic work before he played basketball. He had no issues with time management. He could initiate work on assignments as soon as

they were given, would allocate time for them, and advised if he needed extra time. His work habits were on par with typical peers in sixth grade. When the school district transitioned to distance learning, Student had no difficulty using all of the technology needed. He also used technological accessories, such as an extra monitor and headphones.

Student's speech was easily understood by peers and adults. He had no stuttering, dysfluencies, or articulation issues.

Bonnell was Student's tutor during the 2019-2020 school year, and tutored him for three to four hours per week until the Covid-19 pandemic required distance learning. At that time, Father began to assist Student at home, and worked with him one to two hours per day. Parents paid Bonnell a total of \$2,280 for her services. When Father worked with Student at home, he noted that Student had particular difficulty writing independently.

Student's first semester report card during the 2019-2020 school year covered the period from August 20, 2019 to December 19, 2019. Student received all As and Bs. He received an A+ in science, an A in physical education, an A- in inquiry, B+ grades in band, language arts 6 and world history, and a B- in math 6. Student's citizenship grades ranged from Excellent to Satisfactory.

The report-card was computer generated, and the computer program contained a drop-down menu with pre-written comments, from which teachers could select to comment upon Student's grade. Teachers could not modify the programmed comments. Student's teachers in language arts 6, science 6, and world history, selected a comment from the drop-down menu that stated, "Working below grade level/modified work." This was the only comment available in the drop-down menu by

which a teacher could reference that Student was a special education student, and that his IEP included accommodations. Not all teachers used this comment, but some did. Shepard used it on Student's report card because he used accommodations in her class. The evidence was uncontradicted that Student was not working below grade level in sixth grade, and that, while his teachers implemented his IEP accommodations and modifications, he performed his schoolwork in the sixth grade core curriculum.

Student's science teacher added another pre-written comment from the drop-down menu on the report card: "Achievement due to excellent effort." Student's science teacher did not testify at hearing, but other teachers who used this comment on Student's report cards explained, without contradiction, that it did not imply Student was awarded a particular grade only because he tried very hard. Rather, the comment reflected that Student had earned a good grade and exhibited excellent effort in so doing. Nearly all of his teachers used yet another comment from the drop-down menu: "A pleasure to have in class."

Student's second semester progress report covering the period from January 27, 2020 to March 13, 2020, showed he earned grades of A+ in physical education, band, and world history. He earned an A in math 6, an A- in inquiry, a B+ in language arts 6, and a B in science 6. The language arts 6 and science 6 teachers inserted the pre-programmed and unmodifiable comment from the drop-down menu that stated, "Working below grade level/modified work." Student's citizenship scores were Excellent or Satisfactory, except for one Needs Improvement.

Student's report card for the second semester of the 2019-2020 school year, covering the period from January 13, 2020 through June 10, 2020, showed grades of A+ in physical education and world history; A in math 6, A- in inquiry, B+ in language arts 6,

and B in science 6. Student's language arts 6 teacher, as well as his science 6 teacher, and Shepard, his world history teacher, inserted the pre-programmed and unmodifiable comment from the drop-down menu that stated, "Working below grade level/modified work." The science 6 teacher included the pre-programmed and unmodifiable comment from the drop-down menu that stated, "Achievement due to excellent effort." Other teachers inserted the pre-programmed drop-down comment "A pleasure to have in class." Student's citizenship grades ranged from Excellent to Satisfactory.

Student made progress in reading during the school year. On January 21, 2020, Student earned a 925 Lexile score, which was within the sixth grade reading range. This was an improvement from his November 15, 2019 Lexile score of 875. On January 23, 2020, he earned 99 percent on reading fluency accuracy and 70 percent on comprehension on a sixth grade reading range text on a Fountas and Pinnell reading assessment.

On the iReady diagnostic assessment which the school district administered on September 3, 2020, when Student had just entered seventh grade, his Lexile score was 1000, which placed him in the seventh grade reading level range, and on-track for college readiness. On the iReady diagnostic tests, he tested at the sixth grade level on vocabulary, at the fifth grade level in literature comprehension, and at the early seventh grade level on informational text comprehension. His overall iReady diagnostic score of 597 placed him at the sixth grade level. Of the 57 seventh graders at his school, 19 had overall iReady scores on grade level; 12, including Student, scored at the sixth grade level; and 26 scored at the fifth grade level.

Student made progress on all of his goals during the 2019-2020 school year, and Gutierrez prepared his goal progress reports for the school year. The goal progress

reports dated June 10, 2020, for each of the goals showed that he had progressed on the goals to such an extent that they were essentially met. However, as the school was still engaged in the novel situation of distance learning, Gutierrez was concerned about Student's ability to maintain such growth and therefore believed the goals should continue to the next annual IEP. By the time of the next annual IEP team meeting in November 2020, described below, Student maintained his progress and met all of the goals. On Goal 1, Student's reading comprehension goal, the goal comments stated he met the goal, and included Student's fall 2020 Lexile level of 1000, which fell in the seventh grade range. He scored 93 percent on comprehension questions regarding character details/analysis, main events, and theme about the novel *Tangerine*. Uncontradicted evidence at hearing showed *Tangerine* was included in the seventh grade curriculum and assigned to everybody in Student's seventh grade general education class. Student scored 100 percent on informational text comprehension regarding character analysis, author's purpose, inference, and critical analysis. Further, Student shared his analysis of characters during class discussion and was correct 75 percent or more of the time. Even when his analysis was incorrect, it often contributed to the class discussion in a beneficial way.

The comments on Goal 2, Student's second reading comprehension goal, stated he met the goal, and achieved greater than 75 percent accuracy, using sixth grade level text. The goal comments also repeated the information about fiction and informational text comprehension as was contained in the comments to Goal 1.

On Goal 3, Student's Writing-responding to literature goal, the comments section noted Student met the goal based on multiple writing opportunities since the last annual IEP. Student scored 7/10 on the response paragraphs involving symbolism, imagery, figure of speech, tone, and theme; 10/10 on the character analysis paragraph,

5/5 on creative writing, and 36/40 on the *Tangerine* essay. The comment notes added that Student benefitted from sentence stems and starters. Student also continued to require up to four prompts per paragraph to assist him in organizing his ideas prior to writing his first draft.

ISSUE 2A: DID THE IEP DATED NOVEMBER 12, 2019, AS AMENDED,  
DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE AND  
SUFFICIENT SPECIALIZED ACADEMIC INSTRUCTION?

Student contends that San Marcos Unified did not offer an appropriate amount of specialized academic instruction in the November 12, 2019, IEP, in that it offered the same number of instructional minutes as did the November 14, 2018 IEP, and Student did not make progress. Student contends that the specialized academic instruction should have included a targeted reading intervention program to address Student's "reading disorder," and an instructional program to address Student's executive functioning deficits, based upon Dr. Gray's neuropsychological report.

The November 12, 2019 IEP offered 300 minutes per week of specialized academic instruction, as did the November 14, 2019 IEP, but it offered them in a different configuration. The IEP offered 250 instructional minutes per week on a push-in basis in Student's general education class, and 50 instructional minutes per week on a pull-out basis in a separate classroom. In both settings, the team intended the teaching be directed to English language arts or other core content instruction.

As discussed above, Student made progress under the program in the November 2019 IEP. He met his goals, and his grades improved. His Lexile score in February 2019 placed him in a grade level reading range. The score dropped at the beginning of the



school year, but Student quickly raised it again. By November of his sixth grade year, Student was at a nearly-grade-level reading range. His academic scores on the triennial assessment were mixed, but he functioned very well in class.

Student asserts that the change in the delivery model, from all push-in to partly pull-out, was not substantively different from the all push-in model of the previous IEP, but neither the law nor the facts support Student's criticism. The law considers instruction in a separate classroom as a more restrictive environment than education in a general education classroom. (Ed. Code, § 56361.) This distinction has some significance with respect to the legal requirements pertaining to educating a child in the least restrictive environment. (20 U.S.C. § 1412 (a)(5); Ed. Code, § 56040.1) From a factual perspective, including a pull-out environment in Student's program could provide him with more focused specialized academic instruction. Significantly, Student did not offer any specific evidence as to how many minutes of specialized academic instruction Student required overall. Student did not demonstrate that the amount of academic instruction in the November 12, 2019 IEP, as amended, was not reasonably calculated to enable Student to make appropriate progress in light of his circumstances.

Student's contention that he required a specialized reading remediation program to receive a FAPE was not supported by the evidence. Student asserts that his expert, Dr. Gray diagnosed him with a "reading disorder," based upon the assessment Dr. Gray performed in February 2020, months after the November 2019 IEP meetings. However, in his report Dr. Gray declined to diagnose Student with any disorder, and there was no evidence that San Marcos Unified was aware at any time that Student was formally diagnosed with a reading disorder. Indeed, Dr. Gray's assessment report stated that current data revealed average range functioning across all academic areas, including reading fluency and comprehension, with notable difficulties in math fluency. His report

did not recommend a formal remedial reading program. Moreover, as the November 2019 IEP teams were aware, Student made progress in reading throughout the previous school year, and met his academic goals in reading and math, both of which required reading and reading comprehension skills. He did not need a remedial reading program to achieve that progress then, and there was no indication to the IEP team at either of the November 2019 IEP meetings that Student required such a program to continue to progress. Under these circumstances, pursuant to the “snapshot” rule of *Adams*, it was reasonable that the IEP team did not offer Student such a program. Further, as stated in *Gregory K, supra*, San Marcos Unified had no obligation to maximize Student’s educational benefit, and no obligation to adopt Student’s preferred program, as long as San Marcos offered Student a FAPE.

A similar analysis applies to Student’s contention regarding a targeted program to address Student’s executive functioning skills. Student had met his on-task work completion goal during the past year, and his present levels of performance in the November 12, 2019 IEP specifically mentioned Student’s progress with focusing, establishing good work habits, keeping his binder organized, and keeping track of his assignments. The team noted Student benefitted from extra time, frequent check-ins to ensure understanding, reteaching, and repetitions. Student made this meaningful progress without any separate targeted program to address his executive functioning skills, and the November 2019 IEP team had no reason to believe that he needed any such program now. Under the “snapshot” rule of *Adams, supra*, given Student’s meaningful progress in the area of executive functioning, it was reasonable for the IEP team not to offer such a program but to rely on other aspects of the IEP to address Student’s executive functioning skills. Additionally, as stated in *Gregory K., supra*, an IEP

need only offer Student a FAPE. A school district need not maximize Student's education, or offer programs preferred by Parents.

Student's reliance on Dr. Gray's report to support that he required a targeted program to address his executive functioning deficits is misplaced. In his report, Dr. Gray did not diagnose Student with any disorder, and he specifically declined to diagnose Student with a neurodevelopmental attention-based disorder such as attention deficit hyperactivity disorder. Dr. Gray's recommendations in his report to address Student's variable attention were already included in Student's IEP accommodations. Similarly, several of Dr. Gray's recommendations regarding organization and time management were already included in Student's accommodations.

It is true that Dr. Gray presented his assessment report at the May 11, 2020 IEP amendment IEP meeting, and that his report contained recommendations for explicit teaching in using an organizational system, educational therapy, and instruction in executive functioning skills. At the May 2020 amendment IEP team meetings, the IEP team added accommodations to Student's IEP to further address Student's executive functioning, based on Dr. Gray's assessment report. However, as the court stated in *Westmoreland, supra*, an IEP team need only consider an independent expert's report; it need not adopt its recommendations as long as the IEP otherwise offers Student a FAPE. There was no evidence that Student required any additional specialized academic instruction or services in the area of executive functioning to receive a FAPE.

Finally, and significantly, Student benefitted from the specialized academic instruction in this IEP. Based on the drop in Student's Lexile reading level at the beginning of the school year, Student contends that Student made no progress in the

2018-2019 school year, and therefore the IEP team should have increased the number of instructional minutes in the November 12, 2019 IEP, as amended. However, except for the brief drop in his Lexile score, on which Student relies, Student's reading levels overall significantly improved both in the 2018-2019 school year and in the 2019-2020 school year. Additionally, the evidence was uncontradicted that Student was able to perform grade-level work in the general education curriculum and achieve good grades, which he maintained throughout the 2019-2020 school year. He also met all of his goals. Student presented no evidence that any of his grades were inflated, or that he was unable to access the general education curriculum with the amount of specialized academic instruction offered in the November 12, 2019 IEP, as amended.

The IEP of November 12, 2019 contained sufficient specialized academic instruction. The specialized academic instruction offered in this IEP was reasonably calculated to permit Student to make appropriate progress in light of his circumstances. The IEP did not deprive Student of a FAPE on this ground.

**ISSUE 2B: DID THE IEP DATED NOVEMBER 12, 2019, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER OCCUPATIONAL THERAPY, EXECUTIVE FUNCTIONING, AND SPEECH AND LANGUAGE SERVICES?**

Student contends that the independent assessments of Feeney and Dr. Gray demonstrated that Student needed services in occupational therapy and executive functioning. Student further contends that since the IEP team provided Student's speech and language services in the May 18, 2020 amendment to the November 12, 2019 IEP, to assist with his writing goal, such services should have been included earlier.

San Marcos Unified exited Student from occupational services after an occupational therapy assessment in 2016. At the November 12, 2019 IEP team meeting, and at the amendment team meeting on November 15, 2019, no member of the IEP team, including Parents, raised any concerns regarding Student's fine motor skills, and nobody at the meetings suggested that Student be assessed for occupational therapy. Subsequently, in February 2020, Adams, a San Marcos Unified occupational therapist, conducted an occupational therapy assessment, and determined that Student did not require school-based occupational therapy services. Thereafter, in July 2020, Feeney conducted an independent occupational therapy assessment, and determined Student had numerous deficits and required many interventions. For the reasons discussed above, Adams's assessment and opinions were more credible than were Feeney's.

Consequently, Student did not demonstrate that San Marcos Unified had knowledge that Student required occupational therapy services at the time of the November 12 and November 15, 2019, IEP meetings. Nor did Student meet his burden of demonstrating that he required occupational therapy services at any time during the effective dates of the November 12, 2019 IEP, as amended.

With respect to Student's executive functioning, the IEP's present levels of performance reflected Student's progress in executive functioning skills. Tools and strategies to address these and other executive functioning skills were addressed in the accommodations section of the IEP. These included repeating instructions, breaking down information into manageable chunks to support Student's understanding and work completion, extra time to complete tasks and assessments, checking for understanding, flexible scheduling that allowed him breaks, different seating arrangements and seating away from distractions, access to a separate setting for tests and reteaching, and to complete assignments with extra time. The team also noted that

Student met his on-task work-completion goal. Student arrived at class prepared and ready to learn, and his on-task behavior for work completion was not an area of concern for his teachers. His need for reminders or clarification fell within the typical expectations for students in his age group.

Under these circumstances, based upon the information the IEP team had at the time of the November 12, 2019 IEP, executive functioning services beyond the IEP accommodations were not required to assist Student to benefit from his education. (Ed. Code, § 56363, subd. (a).) Nor did Student demonstrate that he required any such services during the effective period of this IEP, as discussed above with respect to Issue 2A and Dr. Gray's assessment.

With respect to speech and language services, Student was exited from speech and language services in 2016, following a speech and language assessment. Nobody on the IEP team, including Parents, raised his communication skills as an area of concern at the November 12, 2019 or November 15, 2019 team meetings. Subsequent to the meetings, at Parent request, San Marcos Unified agreed to conduct a speech and language assessment. Pecile, a school district speech-language pathologist conducted the assessment and concluded that Student was not eligible under the category of speech or language impairment. San Marcos Unified scheduled an IEP team meeting for February 12, 2020, to discuss the results of both Pecile's assessment and Adams's occupational therapy assessment, but Parent requested the meeting be postponed until after Dr. Gray's assessment was completed. Therefore, Pecile did not present her speech and language assessment report until May 18, 2020. Based on the information shared at that meeting, Pecile determined that Student required direct speech and language services to address his needs in expressing himself through writing, and that she should work with Student on his written language goal. As a result, the November 19, 2019 IEP

was amended to include the speech-language pathologist as a responsible person on the speech and language goal, and to add 30 minutes per week of individual pull-out speech and language services.

Prior to this time, the IEP team had no information that Student required speech and language services. Indeed, Student's two most recent speech and language assessments had not found him eligible as a student with a speech or language impairment, and nobody at the November 12, or November 15, 2019 IEP team meetings, including Parents, raised communication as an area of concern. Student presented no expert testimony to support that Student required speech and language services at any relevant time, or to contradict any aspect of Pecile's speech and language assessment. Under the "snapshot rule," the November 12, 2019 IEP did not deprive Student of a FAPE for failing to offer speech and language services until the May 18, 2020 amendment to the IEP.

ISSUE 2C: DID THE IEP DATED NOVEMBER 12, 2019, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER GOALS IN OCCUPATIONAL THERAPY, BEHAVIOR, EXECUTIVE FUNCTIONING, ATTENTION, AND TASK COMPLETION, AND APPROPRIATE READING GOALS?

Student contends that the November 12, 2019 IEP deprived him of a FAPE because it did not include goals in the areas of occupational therapy, behavior, executive functioning, attention, and task completion, and appropriate reading goals. San Marcos Unified contends the IEP included appropriate goals to address Student's areas of need.

The evidence reflected that Student did not require goals in the areas of occupational therapy, behavior, executive functioning, attention, and task completion to receive a FAPE. For the reasons discussed above, Student's IEP did not require goals in occupational therapy, because Student did not demonstrate that he needed occupational therapy services to receive a FAPE.

Student's behavior was not an issue at hearing except in terms of task completion. At the November 12, 2019 IEP team meeting, Gutierrez reported that Student had met his previous task completion goal. Further, the present levels of performance in the IEP stated that once he started, he was able to complete independent work. Gutierrez also testified at hearing that Student did not have any issues with time management, and Student could initiate and complete assignments regularly with minimal support besides reminders provided to all students. Shepard also observed that Student timely completed his assignments.

Student's attention and executive functioning deficits were addressed by the accommodations included in the IEP. The evidence reflected Student did not require a goal to make progress in the general education curriculum.

Finally, the November 12, 2019 IEP contained two reading goals, both designed to address reading comprehension, as well as a writing goal which encompassed reading skills, including reading comprehension. Student's Kaufman educational achievement test scores, which were only slightly below average, were the baselines for the goals. Student contends that he should have had additional goals in reading fluency, phonological processing, and spelling, but he offered no evidence that any such goals were needed, or that skills in those areas were not inherently embedded as part of his reading comprehension and writing goals. Gutierrez, Student's special education



teacher in sixth grade, testified without contradiction that no additional goals were required. Dr. Gray, Student's expert, noted in his assessment report that Student's evaluation revealed average range functioning in all academic areas, including reading fluency and comprehension, only having difficulty with math fluency. Significantly, throughout the time this IEP, as amended, was in effect, Student met all his goals, made progress in his reading, and obtained high passing grades in all academic areas, while spending most of his school day in a sixth grade general education class and accessing a grade-level curriculum.

A preponderance of evidence showed that the November 12, 2019 IEP offered Student appropriate goals, and San Marcos Unified did not deprive Student of a FAPE on this ground.

The November 12, 2019 IEP, as amended, was reasonably calculated to provide Student some educational benefit and enable him to make appropriate progress in light of his circumstances. The November 12, 2019, IEP, as amended, offered Student a FAPE.

### ISSUE 3: DID THE IEP OF NOVEMBER 10, 2020, AS AMENDED, DENY STUDENT A FAPE?

#### IEP TEAM MEETINGS OF NOVEMBER 10, 2020 AND DECEMBER 2, 2020

On November 10, 2020, when Student was 13 years old and in seventh grade, San Marcos Unified convened Student's annual IEP team meeting. Due to time constraints, the meeting was held over two sessions. The second session occurred on December 2, 2020.

The IEP team at the November 10, 2020, session included Parents, Student's counsel, Pico, Kuykendall, Denny, Buffum, Adams, general education teacher Elizabeth Steele, and Walls. The IEP team at the second session on December 2, 2020, was largely the same, except that Steele was not present and Yvette Cochran, a math teacher, was present. Just prior to the second session of the IEP, Parents unexpectedly sent an email requesting the team consider additional goals. Then, when the second session of the IEP commenced, Father shared that the family would soon be relocating to another state.

The San Marcos Unified IEP team members did not have time to consider the last-minute goals requested by Parents. Rather, the IEP team members worked rapidly to complete the IEP during the second session so that Student would have an offer of FAPE to take to his new school district.

The IEP specified Student's primary eligibility was specific learning disability and his secondary eligibility was other health impairment.

Student's strengths and interests included playing basketball. He was highly motivated by good grades and was able to self-advocate. He was comfortable using technology and liked group projects most. He benefitted from class discussions, graphic organizers, additional time, prompts, and feedback to his clarifying questions. Parent shared Student was making progress and that the areas of present levels accurately represented Student. Father mentioned that Student had done well with distance learning, but was concerned Student was only successful because of the way teachers organized their content on Google classroom. Father was concerned that Student would struggle when he returned to in-person classes, and questioned whether Student required additional goals in the areas of executive functioning. The educators

on the team noted how well Student was doing with the supports and accommodations on his IEP. They noted that Student was beginning to show independence and self-advocacy skills, and to implement his learned strategies.

Student earned high grades during the first half of the school year, based on the grades that appeared on the school's computer portal at the time of the meeting, including a B in math, A- in English language arts, and A+ in physical education. Student's second quarter grades were a B- in history, an A in computer science, and an A+ in science. There were no statewide assessments in spring 2020 due to school closures and COVID-19 restrictions.

The team discussed Student's present levels of performance. In reading and writing, Student's Lexile score of September 3, 2020 was 1000, which fell within the seventh grade level range. Student's iReady diagnostic score was 597, which placed him in the sixth grade level range. He scored at the sixth grade level in vocabulary, at the fifth grade level in comprehension of literature, and at the early seventh grade level in comprehension of informational text. Kuykendall did not consider it unusual that a student would receive higher score on non-fiction than fiction reading, or the opposite. On the Fountas & Pinnell assessment, Student generally achieved scores of "meets expectations," with one score of "approaching expectations."

Student was able to comprehend both literature and informational text, but enjoyed shorter informational text more than long novels. He could read school district-adopted grade level text and sound out most unfamiliar words. He continued to benefit from class discussion, graphic organizers, visual prompts and clarification prior to answering inference questions.

Student was very consistent in his writing and put forth great effort. He benefitted from graphic organizers, teacher modeling, set times to edit with edit checklist, and small group and one-on-one discussion throughout the writing process. He could earn greater than 90 percent on his final drafts, when given approximately four prompts per paragraph. He continued to need supports to ensure that his elaborations clearly supported his text evidence.

Student enjoyed math. With existing IEP accommodations, including additional time, the option of having assessments read aloud, use of a calculator, and the option to use notes during assessment, Student could solve multiple-step problems and explain his reasoning.

As to communication development, Student received speech and language services to address weakness in expressive language, especially with respect to organization, elaboration, and summarizing. He used graphic organizers, but needed prompting to complete one correctly. He used high level vocabulary, but struggled to expand his thoughts. He was able to add more details and information when prompted. Overall, his use of vocabulary words and ability to answer basic comprehension questions were strengths. He participated in conversations and class discussions with adults and peers without difficulty. He presented with appropriate articulation, voice and fluency compared to his similar-aged peers. Denny, the speech-language pathologist who worked with Student on his writing goal at the time of this IEP, affirmed at hearing that Student had no articulation difficulties.

The team reported no concerns with gross and fine motor development. Student's writing was legible. During distance learning, Student was able to maneuver his mouse to multiple computer monitors and quickly type responses in chats.

In the social emotional area, the IEP described Student as a “model student.” He asked clarifying questions, completed assignments, self-advocated, and enjoyed working with staff and peers. He had increased self-confidence, and was eager to begin assignments. He had no emotional difficulty with distance learning, and behavior was not an area of concern.

In the vocational area, Student had great attendance and turned in most assignments on time. He checked various internet tools to ensure that he turned in work on time.

The team had no concerns with student’s adaptive/daily living skills when he was in-person at school. During virtual instruction, Student was able to show up on time to videoconference courses. The team also had no concerns with Student’s health.

The team drafted goals to address the areas of need of language arts: reading and writing. At the second session of the IEP team meeting, on December 2, 2020, the team decided that Student did not require a reading goal, and the draft reading goal was not included in the final version of the IEP. However, Kuykendall, Student’s special education teacher, failed to change the final IEP to reflect the team’s decision that reading was not an area of need for Student and therefore the IEP would not include a reading goal. Kuykendall’s testimony on this issue was not contradicted. The team determined Student did not require a reading goal because Student was reading at grade level per his Lexile score. His classes were reading-intensive, and he was earning As in his classes.

The team determined Student would participate in the California state assessments with designated supports.

The team developed one new goal, in the area of writing. The baseline for the goal was Student writing a single or multiple rough-draft paragraph composition with four prompts per paragraph, earning a score of 83 percent accuracy, as measured by work samples or curriculum based assessments. The new goal provided that, by annual review 2021, with a graphic organizer and following a teacher-led discussion, Student would produce a paragraph composition including a clear claim/thesis, topic sentence, supporting details, commentary, elaboration, and conclusion, with no more than two prompts, earning a score of at least 80 percent on a grade level rubric in three trials, as measured by student work samples. The goal was based upon specified general curriculum writing state standards. The speech-language pathologist was designated as among the people who were responsible for this goal. The team believed Student needed a writing goal because of his difficulty expressing his thoughts in writing. Kuykendall was not concerned that the goal included prompts, or that Student required prompts, as prompts were ordinarily given to every student. Kuykendall considered it an appropriate goal, and it addressed all areas of need. Denny anticipated her services with respect to this goal would help support Student's weaker expressive language through writing. She did not believe any other services were appropriate for Student. She believed that the IEP writing goal and the accommodations adequately supported Student's communications needs in expressive language, including sequencing and performing independent work.

The IEP offered placement in the general education setting, except for the pull-out services Student was to receive. The IEP included a variety of accommodations, nearly all of which were in Student's previous annual IEP of November 12, 2019, as amended. The IEP also included 30 minutes per week of consultation between special education instructional staff and the general education staff. The team discussed

modifications and felt that Student did not require significant modifications to his curriculum, assignments, or assessments. The team decided that, as a college-bound student, he should not have modifications.

The IEP offered the following special education and related services: individual pull-out language and speech services in an individual setting, for 1200 minutes per year; and pull-out specialized academic instruction in a group setting for 30 minutes per week. The pull-out instruction was to work on weekly goals, plan and organize his "to do" list and schedule, and work on study skills. The IEP also offered push-in group specialized academic instruction for 100 minutes per week to support Student in his core English language arts class. The IEP noted that Student was on a quarter system, and if Student was not enrolled in a core English language arts class in a particular quarter, this dedicated specialized academic instruction would not be provided.

Parents and their counsel wanted to review the IEP offer of a FAPE and would respond in writing.

## STUDENT'S PROGRESS DURING THE 2020-2021 SCHOOL YEAR, AND DISENROLLMENT

Student's distance learning continued during the first semester of the 2020-2021 school year, due to the COVID-19 pandemic. Walls, Student's seventh grade general education English language arts teacher testified at hearing. She never met Student in person. He was a "stand-out" Student in her class, which met 80 minutes per day, four days per week, and 30 minutes on one day per week. He asked questions, participated in class, made on-point comments about the characters in their readings, was motivated, and had good relationships with his peers. Student was prepared for class, with his camera always on, and had a monitor and headphones. He paid attention,

always had his materials, and had good organizational skills. Ms. Walls commented that distance learning required following many multi-step directions for students to access their materials on their computers, and Student would share his screen to show his classmates how to perform those tasks. He was a grade-level reader and writer, with a strong work ethic which propelled him to get As. Even with remote learning, she could see him working hard on his assignments, and he wrote daily in class. Every week he wrote a paragraph, and would correct his writing based on her constructive criticism. She had no issues with Student as a learner.

Gutierrez co-taught the class, and helped Student with his IEP goals. Gutierrez helped him with his essays, and Kuykendall worked with him on an individual basis one time per week for 30 minutes to work on organization, or in a small pull-out group for history. Kuykendall held a multiple subject teaching credential and a California Educational CLEAR Specialist Level II credential.

Kuykendall also worked with Student on a push-in basis for support in the general education curriculum in history. Kuykendall focused on history with Student, but he did very well in all of his classes. When she worked with him, he knew what he needed help with, and asked for help. She also worked with him on writing. Student did not need prompting with her when he was using the graphic organizer, he just needed to discuss his thoughts. He needed a sentence frame for just the first three words of a sentence. Student made progress on his goal and was able to access the curriculum with his accommodations. She observed that he earned the grades he received based on the work he completed.

Student's grades on his first quarter report card, covering the period from August 18, 2020 to October 23, 2020, showed he earned an A+ in physical education, an



A- in language arts 7, and a B in math 7. He also took a class called "Advisory," a non-graded class which every student took, which provided an opportunity for students to check in and receive assistance, whether academic or social-emotional, during remote learning. His citizenship grades ranged from Good to Excellent. Both his math teacher and Walls used the pull-down menu to comment he was a pleasure to have in class and that his achievement was due to excellent effort. Walls said this comment meant he was a hard worker and was motivated to put in extra effort to obtain As.

Student's formal second quarter progress report for the period October 26, 2020 to December 2, 2020, showed grades of A+ in science 7 and computer science, and an A in world history. His citizenship grades ranged from Good to Excellent. His computer science teacher included the comments from the pull-down menu saying Student was a pleasure to have in class and his achievement was due to excellent effort. Student's enrollment record showed he left San Marcos Unified on December 18, 2020, which was the last day before the winter recess.

After the family moved out-of-state, Student was assessed by a Lindamood-Bell Center in the family's new location. Lindamood Bell is a private provider that offers structured programs designed to help students improve their academic skills. Lindamood-Bell assessed Student in reading and writing. At hearing, Father testified Lindamood-Bell testing showed Student was performing far below grade level and therefore needed reading intervention. However, Student offered no testimony from Lindamood-Bell, or any reliable evidence regarding the significance of the Lindamood-Bell tests. None of the test protocols for these tests were offered into evidence. There was no evidence as to what these tests were, what they measured, who administered these tests, their training and experience in administering these tests, Student's behavior during the tests, how these tests were administered, how these tests were interpreted,

the significance of these test scores, what they revealed about Student's academic performance, what services Lindamood-Bell proposed to offer Student, and how much those services would cost. Under these circumstances, the scanty evidence regarding Lindamood-Bell testing is given little weight. The weight of the evidence, as shown by testimony regarding Student's in-class performance, documented grades, and documented test scores on reliable standardized academic reading measures, demonstrated Student was performing at or near grade-level in a general education class on a general education grade-level core curriculum in fall 2021, up to the time he disenrolled from San Marcos Unified.

**ISSUE 3A: DID THE IEP OF NOVEMBER 10, 2020, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE AND SUFFICIENT SPECIALIZED ACADEMIC INSTRUCTION?**

Student contends that the number of minutes of specialized academic instruction was insufficient, in that the number was reduced from the previous IEPs and he had not made progress. Further, Student contends he required a specific reading program to address his reading disorder. Additionally, the IEP did not offer any explicit instruction in executive functioning or writing strategies. San Marcos Unified contends that Student made appropriate progress, and the IEP offered Student a FAPE.

The IEP offer of 30 minutes per week of pull-out specialized academic instruction was to support Student's executive functioning in working on weekly goals, organizing his assignments, learning study skills, and the like. This, combined with the IEP accommodations, was similar to Dr. Gray's recommendations for instruction in executive

functioning skills. The IEP offer of 100 minutes per week of push-in specialized academic instruction was to address Student's needs in English language arts, and would be used in his English language arts classroom during the first quarter. Student did not have English language arts in the second quarter, but would be enrolled in other general education courses. The IEP team had no information that Student needed any specialized academic instruction support in his other general education classes. Therefore, the IEP team determined that overall Student required less specialized academic instruction than before. The instruction was directly targeted at Student's needs.

As was discussed above, Student did not meet his burden of demonstrating that he needed a specific reading program. There was no report presented to the IEP team by Dr. Gray or anybody else that Student had a "reading disorder." At the time of the November 10, 2020 IEP, Student met all of his previous goals, all of which involved reading skills. He had made A and B grades in his general education classes in sixth grade. His Lexile reading level as of September 3, 2020 was 1000, which fell in the seventh grade level range. His overall iReady score was at a sixth grade level range, with domain scores varying from the fifth grade level in literature comprehension to the early seventh grade level in informational text comprehension.

Student did not demonstrate that he required a special program in writing strategies. Dr. Gray recommended such a program, but, as was discussed above, the court in *Westmoreland, supra*, determined that an IEP team need only consider, and need not accept, the recommendations or conclusions of an independent assessment.

The IEP team reasonably determined that Student's writing issues could be adequately addressed by his writing goal and the specialized academic instruction and speech and language services he would receive in support of the goal.

Finally, the evidence demonstrated that Student performed well with the specialized academic instruction offered in his IEPs. His grades over the course of both quarters were all As with one B. With the supports provided by the specialized academic instruction in the IEP, Student was successfully accessing a grade-level curriculum and benefitting from his education.

The specialized academic instruction offered in Student's November 2020 IEP, as amended, was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances. The IEP did not deprive Student of a FAPE on this ground.

ISSUE 3B: DID THE IEP OF NOVEMBER 10, 2020, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO OFFER SERVICES TO ADDRESS STUDENT'S NEEDS IN THE AREAS OF OCCUPATIONAL THERAPY AND EXECUTIVE FUNCTIONING?

Student contends that the November 10, 2020 IEP deprived him of a FAPE because it failed to offer occupational therapy and executive functioning services. San Marcos Unified contends that the November 10, 2020 IEP offered appropriate services to meet Student's needs.

As was set forth above with respect to Issue 2B, Student was exited from occupational therapy in 2016. Adams's February 2020 occupational therapy assessment concluded that Student did not have occupational therapy needs that prevented him from accessing his curriculum. As was also set forth above, Adams's testimony in support of her report's conclusions was credible, in view of her experience and knowledge. Feeney's occupational therapy assessment and her testimony did not support that Student required occupational therapy to function in the classroom. Consequently, Student did not meet his burden of demonstrating that Student required occupational therapy to receive a FAPE.

As was also set forth above with respect to Issue 2B, Student did not meet his burden of demonstrating that his executive functioning needs were not sufficiently addressed by his accommodations and specialized academic instruction in that previous IEP so as to deprive him of a FAPE. The same analysis also applies here. In fact, the November 10, 2020 IEP, as amended, provided direct specialized academic instruction at the level of 30 minutes per week on a pull-out basis, to work on weekly goals, learn study skills, organizing his schedule and assignments, and practice other executive functioning skills. This level of services, along with the IEP accommodations, offered Student a firm plan designed to provide educational benefit.

The services in this IEP were reasonably calculated to enable Student to make appropriate progress in light of his circumstances. The IEP did not deprive Student of a FAPE on this ground.

ISSUE 3C: DID THE IEP OF NOVEMBER 10, 2020, AS AMENDED, DENY STUDENT A FAPE BY FAILING TO INCLUDE GOALS IN THE AREAS OF INDEPENDENT TASK-COMPLETION AND READING, INCLUDING READING COMPREHENSION AND VOCABULARY, AND AN APPROPRIATE WRITING GOAL?

Student contends that the November 10, 2020 IEP deprived him of a FAPE because it failed to include the areas of independent task-completion and reading, including reading comprehension and vocabulary. San Marcos Unified contends that it was not required to provide goals in these areas as they were not areas of need at the time.

Teachers Kuykendall and Walls testified that independent task completion was not an area of need for Student during fall 2020-2021. Kuykendall testified that at the time of the November 10 2020 IEP, reading was no longer an area of need for Student based upon his progress on his goals, his grades, and his iReady, and Fountas and Pinnell reading assessments. Student was functioning at grade level in his seventh grade classes and receiving good grades. The present levels of performance in the IEP mentioned Student used diverse vocabulary when reading and writing, and used high-level vocabulary when writing. The present levels of performance reflected that, overall, Student's understanding and use of vocabulary words were areas of strength. He completed his assignments, turned most of them in on time, and asked for clarification when assignments were unclear. Student checked his Google classroom program daily, and consistently checked the online agendas teachers posted, as well as checking his

grades online, all to ensure he did not fall behind or forget to turn in assignments. He was willing to complete additional study sessions to retake assessments or to edit his work.

Student did not demonstrate that he required goals in independent task completion or reading, reading comprehension, or vocabulary to make progress in his curriculum. The evidence showed that he was making good progress in a seventh grade general education classroom while accessing a seventh grade curriculum. The lack of goals in the areas of independent task completion and reading did not deprive Student of a FAPE.

Student contends that the single goal in the IEP, in the area of writing, was not appropriate, as it only required Student draft a single paragraph, whereas his prior goals required multi-paragraph compositions. The goal required Student to produce a paragraph composition using a graphic organizer and following a teacher-led discussion. The goal called for the paragraph to have a clear claim/thesis, topic sentence, supporting details, commentary, elaboration, and conclusion, with no more than two prompts, earning a score of at least 80 percent on a grade level rubric in three trials. The goal was tied to the common core seventh grade level writing standard. The baseline for the goal was Student's need for four prompts per paragraph to write rough draft paragraphs, earning a score of 83 percent accuracy. As Kuykendall explained at hearing, the goal was more challenging than Student's prior goals, all of which he had met, because unlike Student's prior goals, it required Student's writing to conform to a grade-level rubric. Furthermore, it called for only two prompts instead of four. Kuykendall was not concerned that the goal permitted prompts, as students normally needed prompts. The goal required a more sophisticated writing product than

Student's previous goals, and Kuykendall considered it to be appropriately ambitious. As such, it was an appropriate goal and was reasonably calculated to provide Student educational benefits and permit him to make progress in the seventh grade curriculum.

For all of the foregoing reasons, this goal, and the specialized academic instruction education and related services offered in the November 10, 2020 IEP, as amended, constituted an IEP that was reasonably calculated to provide Student some educational benefit and enable Student to make appropriate progress in light of his circumstances. The November 10, 2020 IEP, as amended, offered Student a FAPE.

## CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Issue 1A: The IEP dated November 14, 2018, as amended, did not deny Student a FAPE by failing to offer sufficient specialized academic instruction. San Marcos Unified prevailed on Issue 1A.

Issue 1B: The IEP dated November 14, 2018, as amended, did not deny Student a FAPE by failing to offer services to address Student's needs in the areas of occupational therapy, executive functioning, and speech and language. San Marcos Unified prevailed on Issue 1B.

Issue 1C: The IEP dated November 14, 2018, as amended, did not deny Student a FAPE by failing to include goals in the areas of attention, on-task behavior, executive functioning, and reading. San Marcos Unified prevailed on Issue 1C.



Issue 2A: The IEP dated November 12, 2019, as amended, did not deny Student a FAPE by failing to offer sufficient specialized academic instruction. San Marcos Unified prevailed on Issue 2A.

Issue 2B: The IEP dated November 12, 2019, as amended, did not deny Student a FAPE by failing to offer services to address Student's needs in the areas of occupational therapy, executive functioning, and speech and language. San Marcos Unified prevailed on Issue 2B.

Issue 2C: The IEP dated November 12, 2019, as amended, did not deny Student a FAPE by failing to include goals in the areas of occupational therapy, behavior, executive functioning, attention, task completion, and appropriate reading goals. San Marcos Unified prevailed on Issue 2C.

Issue 3A: The IEP of November 10, 2020, as amended, did not deny Student a FAPE by failing to offer appropriate and sufficient specialized academic instruction. San Marcos Unified prevailed on Issue 3A.

Issue 3B: The IEP of November 10, 2020, as amended, did not deny Student a FAPE by failing to offer services to address Student's needs in the areas of occupational therapy and executive functioning. San Marcos Unified prevailed on Issue 3B.

Issue 3C: The IEP of November 10, 2020, as amended, did not deny Student a FAPE by failing to include goals in the areas of independent task-completion and reading, including reading comprehension and vocabulary, and an appropriate writing goal. San Marcos Unified prevailed on Issue 3C.

## ORDER

All of the relief sought by Student is denied.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Elsa Jones

Administrative Law Judge

Office of Administrative Hearings